No. 80-1232

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1980

THILL SECURITIES CORPORATION, et al.,

Petitioners,

vs.

THE NEW YORK STOCK EXCHANGE,

Respondent,

and

UNITED STATES SECURITIES AND EXCHANGE COMMISSION (Intervenor),

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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APPENDIX

QUESTIONS PRESENTED FOR REVIEW*

1. Whether the New York Stock Exchange (NYSE) has implied antitrust immunity where the Exchange and its members engaged until April, 1972 in a concerted refusal to deal with securities broker-dealers who are not NYSE members with respect to the non-members participating in commissions on Exchange transactions originated by them but effected by the members, under the following circumstances:

a. The challenged conduct is not within the areas of SEC jurisdiction enumerated in the Securities Exchange Act of 1934;

b. The NYSE rule used by the Exchange to justify the challenged conduct was applied in a blatantly discriminatory manner;

c. The challenged conduct was never the subject of SEC attention until about the time this action was commenced and was not acted upon by the SEC for almost 10 years thereafter;

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* **List of all parties**: The plaintiff Thill Securities Corporation brought this class action in its own behalf and in behalf of all other securities dealers and brokers in the United States similarly situated, being those who are not members of the New York Stock Exchange. The action was certified as a class action by order of the district court on March 13, 1972. The original defendant was The New York Stock Exchange. The United States Securities and Exchange Commission and the United States, through the Antitrust Division of the Department of Justice, intervened prior to trial. At its own request, the United States was dismissed without objection while the case was under advisement in the district court.

d. The challenged conduct was never mandated or approved by the SEC and has in fact been consistently criticized by it.

2. Whether the NYSE has similar implied antitrust immunity where the Exchange and its members engaged in vertical and horizontal price-fixing and related restraints between April, 1972 and the time of trial in establishing a 40% *maximum* commission discount on NYSE transactions for non-member brokers, despite the SEC's request that the NYSE permit discounts at a *minimum* of 40%, while continuing to apply this new arrangement in a discriminatory manner.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on October 20, 1980.

REFERENCES TO OPINIONS OF COURTS BELOW

The opinion of the Court of Appeals appears in the Appendix at p. App. 1 and is reported at 633 F.2d 65 (1980).

The opinion of the district court appears in the appendix at p. App. 15 and is reported at 473 F.Supp. 1364 (1979).

The earlier opinion of the district court granting the defendant-respondent summary judgment is reported at 1969 Trade Cases (CCH) ¶72,911 at 87,480. The earlier opinion of the Court of Appeals reversing the summary judgment appears in the Appendix at App. 27 and is reported at 433 F.2d 264 (1970), *cert. denied,* 401 U.S. 994 (1971).

The earlier opinion of the Court of Appeals dismissing the defendant-respondent's attempted appeal of the order certifying this as a class action is reported at 469 F.2d 14 (1972).

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals sought to be reviewed was entered on October 20, 1980. The jurisdiction of this Court is invoked under 28 USC §1254(1).

STATUTES INVOLVED

Section 1 of the Sherman Antitrust Act (15 USC §1):

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: . . .

Section 2 of the Sherman Antitrust Act (15 USC §2):

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other

> person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, . . .

Section 4 of the Clayton Antitrust Act (15 USC §15):

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Sections 19(b)(9) and (13) of the Securities Exchange Act of 1934 ,15 USC §§78 s(b)(9) and (13)) (prior to 1975 amendment):

> The Commission is . . . authorized . . . [to] order [an Exchange] to alter or supplement [its] rules (insofar as necessary or appropriate to effect such changes) in respect to such matters as . . . (9) the fixing of reasonable rates of commission, interest, listing, and other charges . . . and (13) similar matters.

STATEMENT OF THE CASE

A. Procedural History

This is an action for treble damages and for injunctive and declaratory relief under §§1 and 2 of the Sherman Act and §4 of the Clayton Act. The jurisdiction of the district court was based upon 28 U.S.C. §1331(a).

The action was commenced on October 18, 1963. The NYSE eventually filed a motion for summary judgment, which the district court granted. 1969 Trade Cases, ¶72,911 at 87,490. The Court of Appeals reversed. 433 F.2d 264 (7 Cir. 1970), *cert. denied,* 401 U.S. 994 (1971).

The United States of America, through the Antitrust Division of the Department of Justice, intervened in the case. Its pleadings substantially supported the position of the plaintiffs and, in addition, expressly sought elimination of the NYSE's fixed commission rates as to the general public. The Securities and Exchange Commission (SEC) also intervened, substantially in support of the NYSE's position that exclusive jurisdiction of the matter lay with the SEC.

The case was tried to the court beginning on November 27, 1972 and concluded on February 28, 1973. It was taken under advisement in August, 1973.

On January 23, 1975 the SEC adopted Rule 19b-3 requiring the elimination of all fixed commission rates for transactions on national securities exchanges, including the NYSE, effective May 1, 1975. Because of this rule and this Court's decision in *Gordon* v. *The New York Stock Exchange,* 422 U.S. 659 (1975), the United States indicated it would not oppose a motion to dismiss its intervenor's complaint. Plaintiff filed a motion to that effect.

The district court took no further action in the matter until filing the decision and order dismissing the plaintiff's complaint (and granting plaintiff's motion to dismiss the Government's complaint in intervention) on August 15, 1979. Judgment of dismissal was entered on August 20, 1979.

On appeal the Court of Appeals affirmed, holding that:

> (1) The anti-rebate rule, pursuant to which non-member broker-dealers were barred from economic access to the NYSE, is an integral and necessary part of the NYSE's fixed commission rate system.

(2) The fixed commission rate system itself was held in *Gordon* v. *The New York Stock Exchange*, 422 U.S. 659 (1975), immune from antitrust liability because of (i) express statutory SEC authority over fixing commission rates and (ii) explicit SEC approval of the fixed rates challenged there.

(3) The NYSE's anti-rebate provisions have been reviewed by the SEC as an integral part of the general fixed rate structure and are therefore immune from antitrust liability here.

B. The NYSE Rules and Practices Challenged

The complaint charged that the NYSE's anti-rebate rule (contained in §1 of Article XV of the Exchange's Constitution) violated §1 of the Sherman Act insofar as it was applied to prohibit securities brokers and dealers who were not members of the NYSE from sharing in commissions on transactions of their own customers effected through members, who alone have access to NYSE trading facilities.

During all relevant times prior to April, 1972, Article XV, Section 1, provided in pertinent part as follows:

> SEC. 1. Commissions shall be charged and collected upon the execution of all orders for the purchase or sale for the account of members or allied members or of parties not members or allied members of the Exchange, of securities admitted to dealings upon the Exchange and these commissions shall be at rates not less than the rates in this Article prescribed; and shall be net and free from any rebate, return, discount or allowance made in any shape or manner, or by any method or arrangement direct or indirect. . . .

On April 24, 1972, the Exchange's Constitution was amended by the addition of a new paragraph, paragraph 2(h), to Section 2 of Article XV. Paragraph 2(h) pro-

vided for a commission discount up to 40% to qualified non-member broker-dealers who agreed not to pass any part of the discount along to their customers. The text of paragraph 2(h) is set forth at page App. 58 of the Appendix.

On the same date Exchange Rule 385 became effective to implement the provisions of paragraph 2(h) of Article XV. The text of the rule is set forth at page App. 60 of the Appendix. Subsection (a)(2) of the rule limited the discounts to trades for customers of non-member broker-dealers, precluding discounts on trades for the dealers' own accounts.

Thus, from at least 1959 to April, 1972, Exchange members were prohibited from granting rebates or discounts of any sort to any securities broker or dealer who was not a member of the Exchange.

Beginning in April, 1972, members were permitted to grant discounts from the fixed public commission rate to non-member brokers, but only under certain conditions, the most notable of which were these: (1) the amount of the discount could not exceed 40%; (2) the discount was available only on those transactions in which the non-member broker acted as agent rather than for his own account as principal; (3) non-member brokers whose primary purpose, or whose parent organization's primary purpose, was not the transaction of a securities business as a broker or dealer was not eligible for any discount (4) a discount could be granted only to non-members who had signed a written agreement with the Exchange not to pass on any part of the discount to their customers by charging commissions for such transactions at less than the full public rate.

ARGUMENT

I.

THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH DECISIONS OF THIS COURT IN OVEREXTENDING IMPLIED ANTITRUST IMMUNITY TO COVER PRACTICES ILLEGAL PER SE UNDER THE ANTITRUST LAWS, NOT JUSTIFIED BY THE SECURITIES EXCHANGE ACT OF 1934 AND THAT COULD NOT PROPERLY BE SANCTIONED BY THE SEC.

A. Most issues tending to establish the NYSE's antitrust liability are undisputed.

Nearly all elements required to establish antitrust liability on the part of the NYSE exist here and are undisputed:

1. The NYSE and its members enjoy a monopoly in the trading of listed securities. See *Thill Securities Corporation* v. *New York Stock Exchange*, 433 F.2d 264, 265-266 (7 Cir. 1970).

2. The antitrust laws obligate those controlling a monopolized market to afford equal and nondiscriminatory access to all others in the industry. This is the fundamental premise of *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963). See also *Associated Press* v. *United States*, 326 U.S. 1 (1945); *United States* v. *Terminal Railroad Assn.*, 224 U.S. 383 (1912); *American Federation of Tobacco Growers* v. *Neal*, 183 F.2d 869 (4 Cir. 1950); *Denver Union Stockyard Co.* v. *Denver Livestock Comm'n. Co.*, 404 F.2d 1055 (10 Cir. 1968), and many similar cases.

3. Until April, 1972 (more than eight years after this action was commenced) nonmember professional brokers in competition with members of the NYSE for the business of persons buying and selling securities, including securities traded on the NYSE, were completely barred from any direct participation in commissions generated in trades of listed stocks instituted by nonmembers in behalf of their customers but necessarily brought to a member of the NYSE for execution, access to the NYSE being essential to effect the trade in most cases. The principal means by which this total bar was effected was the anti-rebate rule of the NYSE which it interpreted and applied to preclude its members from dealing with nonmember brokers with respect to participation in commissions.

4. There exists no legal justification in the Securities Exchange Act of 1934 or its legislative history or in any mandate by the SEC for barring nonmembers from sharing in commissions generated in substantial part by their efforts.

5. There exists no factual basis relating to the functioning of the NYSE itself or to the functioning of the SEC in overseeing NYSE self-regulation for such barring of nonmember professionals.

6. The evidence in the case was abundant and uncontradicted that a fair share in commissions for nonmember brokers is and always was required by considerations of fairness and competition and is not and never was precluded by express or implied provision of the 1934 Act—or any other Act.

7. The rules and conduct of the NYSE involved here would be per se violations of Section 1 of the Sherman Act in any ordinary commercial context, as remarked by the court on the first appeal. *Thill Securities Corp.* v. *New York Stock Exchange,* 433 F.2d at 267.

The NYSE has found shelter from the antitrust liability the above factors would otherwise require in the Court of Appeals' ruling that the antirebate rule was a necessary part of fixed commissions and therefore enjoys the antitrust immunity conferred on fixed commissions in *Gordon* v. *New York Stock Exchange,* 422 U.S. 659 (1975).

This case is not really about the antirebate rule as such. The rule was merely the means by which nonmember brokers were prevented from effectively competing with Exchange members as shown below. Rather, this case raises the broader question whether the NYSE and its members may with impunity concertedly refuse to deal with competing nonmember brokers regarding participation by the latter in commissions arising from the NYSE-listed business of the nonmembers' customers brought to member firms for execution on the Exchange. In other words, may those who control a monopolized market lawfully bar their competitors from a fair negotiated means of access to that market?

Nonmember brokers were, of course, free to approach member firms on the same basis as the general public, by paying the full public rate. This gave no recognition to the fact that they were professionals who had performed valuable services which were forced to go largely uncompensated for obvious competitive reasons. See *Thill* v. *New York Stock Exchange,* 433 F.2d at 266-267. All members of the plaintiff class, however, were denied direct access to commission income *as professional brokers and as competitors with Exchange members* for the business of members of the public buying and selling listed securities.

B. The Court of Appeals has implied repeal of the antitrust laws far beyond the extent authorized by this Court.

The Securities Exchange Act of 1934 provides no general immunity, express or implied, from the antitrust laws for anti-competitive rules and conduct of securities exchanges, whether or not they have been reviewed and not disapproved by the SEC. This Court stated in *Gordon* v. *New York Stock Exchange,* 422 U.S. 659 at 682 (1975):

> This Court has considered the issue of implied repeal of the antitrust laws in the context of a variety of regulatory schemes and procedures. Certain axioms of construction are now clearly established. Repeal of the antitrust laws by implication is not favored and not casually to be allowed. Only where there is a "plain repugnancy between the antitrust and regulatory provisions" will repeal be implied. *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 350-351 (1963). See also *Merrill Lynch, Pierce, Fenner & Smith* v. *Ware,* 414 U.S. at 126; *Hughes Tool Co.* v. *Trans World Airlines, Inc.,* 409 U.S. 363, 385-389 (1973); *Carnation Co.* v. *Pacific Conference,* 383 U.S. 213, 217-218 (1966); *Silver* v. *New York Stock Exchange,* 373 U.S. at 357-385; *United States* v. *Borden Co.,* 308 U.S. 188, 198-199 (1939). See *United States* v. *National Assn. of Securities Dealers, post,* at 719-720, 729-730.

The evidence in this case disclosed no repugnancy whatsoever between the relevant antitrust and regulatory provisions. The conduct of the NYSE challenged here is clearly illegal under the antitrust laws. There is nothing in the 1934 Act or in the role of the SEC under that Act that might require the SEC to sanction such anti-competitive conduct. It is inconceivable that the SEC would or could properly sanction such conduct after express consideration of it. Indeed the SEC has never done so.

No reasons were advanced at the trial by the NYSE or the SEC and none were suggested in the opinion of the Court of Appeals as to *why* prohibition of discount to nonmember brokers was an integral or necessary part of the fixed public commission rate structure or *how* the proper functioning of the SEC would in any way be impaired were an antitrust court to declare the prohibition illegal. As will be shown, the evidence firmly established that the prohibition was unnecessary to preserve the fixed rate structure and its elimination would in no way have infringed upon the proper jurisdiction or functioning of the SEC.

II.

THE COURT CLEARLY ERRED IN FINDING THAT BARRING ACCESS TO NONMEMBER BROKERS WAS A NECESSARY PART OF FIXED COMMISSIONS

The fundamental premise of the Court of Appeals' decision is that the antirebate rule was an integral and necessary part of fixed commissions. That conclusion oversimplifies and distorts the true issue in order to rationalize the extension of the immunity granted to fixed public commissions in the *Gordon* case to cover the barring of access to nonmember brokers.

The real question, which the court never confronted, is whether a fixed commission system requires that nonmember brokers be prohibited from participating in commissions generated by their efforts on transactions brought of necessity to the NYSE's monopoly securities market and thus from competing effectively with member firms. The virtually uncontradicted evidence is that barring nonmember brokers from participation in commissions on their own business referred to members for execution is totally unnecessary to maintaining a fixed public rate system:

1. Other exchanges allowed direct discounts to nonmember brokers while maintaining the same fixed public rates as the NYSE. The Court of Appeals failed to comment on this.

2. As of March, 1972, a 40% direct discount was instituted at the NYSE while substantially preserving fixed commissions, which were not abolished until May of 1975. The Court of Appeals gave no explanation how these allegedly mutually necessary and inextricably intertwined rules thus became disentwined without mortal damage to the fixed commission system.

3. Reciprocal practices (described below) were long used by members of the NYSE to compensate *some* favored nonmembers, whose business volume was large enough to attract the interest of member firms and to warrant membership on a regional exchange, as an indirect way around the antirebate rule. These practices existed even after the 40% direct discount was instituted to achieve effective discounts of about 50%. They coexisted comfortably with fixed public commissions, a fact the Court of Appeals seems to ignore in holding in effect one cannot have fixed public commissions and discounts to nonmember professionals at the same time.

It is obvious the logic of fixed commissions implies a prohibition of rebates to the *public*. It is equally obvious there is no inconsistency between fixed public commissions on the one hand and, on the other, a sharing of such commissions between the nonmember brokers that generated them and the member brokers that executed the transactions. On the basis of an apparently circular argument the court below says that *Gordon* prevents critical examination of the argument that: (a) fixed commissions enjoy antitrust immunity under *Gordon;* (b) the antirebate rule

is integral and necessary to fixed commissions; (c) therefore, the antirebate rule too is immune from antitrust liability. *Gordon* is said to prevent attacking the application of the antirebate rule to nonmember brokers because the merits of the rule are rendered irrelevant to the question of antitrust immunity. In the court's view we must accept the validity of the conclusion (that the antirebate rule as applied to nonmember brokers is immune) but cannot attack the premise on which it is based. To put the argument in another way: the antirebate rule is immune because it is necessary and we cannot challenge its necessity because the rule is immune.

The court below evaded the impact of de facto reciprocity and discounts on its "necessity" position by stating these things are themselves the subjects of SEC review and thus not to be considered. SEC concern with these matters is, we submit, beside the point, which is that these practices destroy any claim of a mutual dependency between fixed commissions and compensation to nonmember brokers.

The Court of Appeals lost sight of the fact that we are dealing with the relationship between *competitors.* That was not the case in *Gordon.* On the first appeal in the case at bar the Court of Appeals properly delineated "essential distinctions" between fixed public commissions and the denial of nonmember broker access (433 F.2d at 270):

> "The power to deny information to nonmembers of an exchange is plainly susceptible to misuse as a means to destroy competition. The power to fix rates, unlike the power to exclude, is not a weapon that can be used to injure a particular competitor. The rates, once fixed, apply equally to all Exchange members and to all customers. It is not suggested by the plaintiffs here that the rates are not uniformly applied, that the

> schedules are discriminatory, or that the power has been used to eliminate competition beyond that elimination inherent in any system of authorized price-fixing."
>
> The power to refuse to share commissions with certain non-members is "plainly susceptible to misuse as a means to destroy competition." It is a weapon "that can be used to injure a particular competitor." The rates once fixed, apparently do not "apply equally to all." . . . And, it is "suggested by plaintiffs here that the rates are not uniformly applied," are discriminatory, and that the "power has been used to elminate competition."

The Court of Appeals in the most recent appeal also glosses over the differences with *Thill* stressed by the *Gordon* court itself (422 U.S. at 686-687) as being *"persuasively distinguishable."* In addition to the then lack of evidence of SEC review, the Court pointed out the antirebate practice differs from fixed commission rates in that (1) even though it might be related to fixing commission rates, it is not specifically mentioned in §19(b)(9), and (2) it does not necessarily apply uniformly and may be applied in a discriminatory way. We have already discussed the lack of any relevant connection between fixed commissions and the use of the antirebate rule to exclude and suppress competition from nonmember professionals. The discriminatory application of the rule is discussed below.

In *Gordon* antitrust immunity was implied because of the SEC's express and repeatedly exercised power under §19(b)(9) of the 1934 Act to regulate fixed public commissions. Nothing in the terms of the Act or its legislative history warrants stretching this immunity to cover the NYSE's suppression of competition from nonmember brok-

ers by preventing, through the medium of the antirebate rule, participation in commissions generated by the nonmembers.

Limiting the scope of implied immunity to literal statutory boundaries was required in *United States* v. *National Association of Securities Dealers, Inc.*, 422 U.S. 694 (1975). Price fixing in secondary market transactions in mutual fund shares was held immune from antitrust liability because in §22(f) of the Investment Company Act of 1940 Congress contemplated and authorized the challenged restrictions. However, the Court rejected an immunity defense based on §22(d) of the same Act. The NASD argued the price fixing mandate in that section should be broadly construed to apply to all broker-dealer transactions and thus to immunize secondary as well as primary market price maintenance. The Court held at 719-720:

> Implied antitrust immunity is not favored, and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system. See, *e.g.*, *United States* v. *Philadelphia National Bank*, 374 U.S., at 348; *United States* v. *Borden Co.*, 308 U.S. 188, 197-206 (1939). We think no such showing has been made. Moreover, in addition to satisfying our responsibility to reconcile the antitrust and regulatory statutes where feasible, *Silver* v. *New York Stock Exchange*, 373 U.S., at 356-357, we must interpret the Investment Company Act in a manner most conducive to the effectuation of its goals. We conclude that appellees' interpretation of §22(d) serves neither purpose, and cannot be justified by the language or history of the section. We therefore hold that the price maintenance mandate of §22(d) cannot be stretched beyond its literal terms to encompass transactions by broker-dealers acting as statutory "brokers." Congress defined the limitations for the mandatory price maintenance requirements of the Investment Company Act. "We are not only

> bound by those limitations but we are bound to construe them strictly, since resale price maintenance is a privilege restrictive of free economy." *United States* v. *McKesson & Robbins*, 355 U.S. 305, 316 . Accordingly, we hold that the District Court erred in relying on §22(d) in determining that the activities here questioned are immune from antitrust liability.

The lack of any necessary connection between fixed commissions and discounts to nonmember brokers was proved by the undisputed evidence that inauguration of the 40% nonmember discount in 1972 had no adverse effect on the self-regulation and functioning of the NYSE, as confirmed by *all* NYSE officials who testified on the point. The then president of the NYSE, himself a former SEC Commissioner, testified that nothing about the Securities Exchange Act of 1934 necessitated the total barring of nonmember brokers from direct economic access to the Exchange. Another former SEC Commissioner testified the 1934 Act does not and never has required denial of compensation to non-member brokers for listed business referred to members, that, on the contrary, basic business fairness has always required that they be compensated and that such compensation should be direct rather than indirect. The SEC official who headed its Division of Trading and Markets for many years testified the 40% direct discount to nonmember brokers had not had any adverse impact on the regulatory ability of the SEC.

Consistent with the pronouncements in *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357-358 (1963), *Gordon* (422 U.S. at 682) and *NASD* (422 U.S. at 719), this Court should decline to imply antitrust immunity as to conduct (a) not expressly authorized by the relevant Act, (b) that serves no purpose implicit in the Act, (c) the elimination of which has proved to have no adverse impact on the

regulatory functions of the SEC or the self-regulatory functions of the NYSE, (d) is self-evidently and *by design* restrictive of a free and competitive economy and (e) is universally condemned by antitrust courts in most other commercial contexts.

III.

IMPORTANT FACTUAL TESTS FOR ANTITRUST IMMUNITY REMAIN AFTER THE GORDON CASE. UNDER THESE TESTS THE NYSE IS LIABLE UNDER THE ANTITRUST LAWS.

The Court of Appeals improperly held there is no proper factual inquiry to be made after *Gordon,* once it is determined there has been SEC review pursuant to statutory authority. There are significant factual inquiries that remain, all of which, on this record, must be resolved against the NYSE and against antitrust immunity.

A. One factual test is whether the NYSE's bar, effected primarily through the antirebate rule, against nonmember brokers participating in commissions generated by them is a necessary part of the fixing of commission rates referred to in §19(b)(9) of the Securities Exchange Act of 1934.

It was shown above the antirebate rule was not, in the relevant sense, necessary in the face of overwhelming evidence to the contrary and that the courts below failed to distinguish between public rates and participation in commissions by nonmember professionals.

B. A second factual test is whether the antirebate rule was applied in a discriminatory way.

In distinguishing *Thill* this Court in *Gordon* deemed persuasive (422 U.S. at 687) the fact that the antirebate

rule may be applied in a discriminatory manner. This implies any immunity that might otherwise exist is waived if NYSE rules are discriminatory in form or application.

Such a waiver is clearly appropriate under *Silver* v. *New York Stock Exchange,* 373 U.S. 341 (1963), in which the court said (at 364):

> Congress in effecting a scheme of self-regulation designed to assure fair dealing cannot be thought to have sanctioned and protected self-regulative activity when carried out in a fundamentally unfair manner.

Silver also made clear that the antitrust laws provide the appropriate remedy for discriminatory practices by an exchange (373 U.S. at 358-60):

> There is nothing built into the regulatory scheme which performs the antitrust function of insuring that the Exchange will not in some cases apply its rules so as to do injury to competition which cannot be justified by furthering legitimate self-regulatory ends. . . . Enforcement of exchange rules, particularly the New York Stock Exchange with its immense economic power, may well, in given cases, result in competitive injury to . . . a nonmember broker dealer . . . when the imposition of such injury is not within the scope of the great purposes of the Securities Exchange Act. Such unjustified self-regulatory activity can only diminish public respect for or confidence in the integrity and efficacy of the exchange mechanism. Some form of review of exchange self-policing, whether by administrative agency or by the courts, is therefore not at all incompatible with the fulfillment of the aims of the Securities Exchange Act. . . . Since the antitrust laws serve, among other things to protect competitive freedoms, i.e., the freedom of individual business units unhindered by the group action of others, *it follows that the antitrust laws are peculiarly appropriate as a check upon anti-competitive acts of ex-*

> *changes which conflict with their duty to keep their operations and those of their members honest and viable.* Application of the antitrust laws, therefore, rests on the need for vindication of their positive aim of insuring competitive freedom. *Denial of this applicability would defeat the congressional policy reflected in the antitrust laws without serving the policy of the securities Exchange Act.* (Emphasis supplied.)

Even if specific exercised SEC authority conferred immunity with respect to the particular application of the antirebate rule complained of in this case, such immunity is waived because the Exchange abused its self-regulatory position by applying the antirebate rule in a discriminatory way to nonmember professionals. Thus it was error for the courts below to refuse to consider the abundant evidence of such discriminatory application.

It cannot be denied the antirebate rule, as applied to nonmember professionals, was inherently discriminatory. It was undisputed that when one NYSE member executed transactions and performed related services for another member's customers, the referring member received from 60% to 85% of the commission. If a nonmember broker made exactly the same referral he received *nothing,* until the 40% discount was adopted in 1972. This patent discrimination is a frontal violation of the cases requiring equal and nondiscriminatory access to any monopolized market.

Not only did application of the antirebate rule to nonmember professionals put them at an extreme competitive disadvantage; it was applied unevenly and in a highly discriminatory way *as among nonmember professionals.*

Reciprocal business was made available, but for the most part only to the relatively small number of members of the plaintiff class who were members of regional exchanges. A

number of nonmembers, and even some member firm representatives in describing the experiences of their firms before becoming NYSE members, testified they were forced to do their customers' NYSE-listed business at a loss before joining an exchange, no compensation, direct or indirect, being available because of the antirebate rule.

The size and economic clout of a nonmember firm was a determining factor in whether it could obtain any form of indirect compensation. If its volume of referred business was large it might obtain reciprocal business, otherwise member brokers would not bother with it.

Reciprocal business as a substitute for direct access was described by the NYSE's economic expert as an allocative distortion, distractive, and a socially irrelevant and alien factor in the competitive process.

No such distortion and discrimination is justified by the 1934 Act. Nothing in this record suggest the SEC could properly *require* that nonmember brokers be barred or restricted in the way the NYSE did until 1972. It is thus incongruous to hold that the proper functioning of the SEC might in some way be impaired or contradicted by the court's application of antitrust standards to a practice not justified by any regulatory standard.

C. A further factual test is whether, if the barring or limitation of nonmembers were specifically authorized by the 1934 Act and if there were no discrimination in enforcing it, the SEC's activity in the area is such as to oust antitrust jurisdiction.

Since the conditions for raising this question do not exist, it should not be necessary to confront it. It is true the SEC noticed the access problem in the 1963 Special Study. It is *not* true the antirebate rule was "consistently

treated by the SEC as a component of the fixed commission rate structure", if the court meant to suggest the SEC's reviews of NYSE rate increases through 1968 included any specific attention to the rule. It is undisputed the antirebate rule and nonmember access were *not* considered on any of those occasions. See SEC Special Study, Part 2, at 311. The mention of the nonmember access problem in the Special Study is the only evidence of SEC concern or attention until this lawsuit was commenced. During the five years following the Special Study there was virtually *no* action on nonmember access or the antirebate rule, other than an exchange of a few letters in late 1965 and two more letters in 1966. There was also evidence of two "discussions" between the NYSE and the SEC during that time, but nothing of substance occurred. The SEC's casual activity during this five year span amounted to little more than benign neglect. Indeed, a witness who was an SEC official at the time testified that in that period the SEC was simply not concerned about and did not address the question of access for smaller nonmember brokers—it was not deemed an important question by the SEC.

By studied generalizations, omission of specifics and generous mixing in of activity on other matters, the NYSE and the SEC sought to create the illusion of vigorous SEC action regarding the antirebate rule and nonmember access. The record is otherwise. Through the time of trial the SEC *never* issued the request-for-rule-change letter pursuant to §19(b) of the 1934 Act, by which it formally takes jurisdiction to effect a rule change, regarding compensation for nonmember professionals. Not until October, 1970 did the SEC suggest the NYSE submit a specific nonmember access proposal. Not until August, 1971 did the NYSE make such a proposal—a 30% direct discount.

In September, 1971 the SEC proposed the discount be "not less than 40%." In March, 1972, approximately *nine years* after the SEC Special Study and *eight years* after this lawsuit was begun, the NYSE finally instituted its "not more than" 40% discount for nonmember brokers.

The belated and spordic activity of the SEC and the NYSE regarding nonmember access and the antirebate rule undertaken well after this action was underway could, theoretically, have produced a result inconsistent with the relief sought here by the plaintiff. The record suggests no reasonable basis on which it might have happened, but the SEC could have ordered the NYSE to bar nonmembers from participating directly in commissions generated by them. We are now assured that will not happen. The SEC came down in support of negotiated nonmember access even before Congress legislated away fixed commissions. Thus, active assertion of SEC jurisdiction, if it has any meaning in this context, is moot. There is now no danger of possible conflict between the SEC and the courts in this case and no reason for the court to abstain from applying antitrust standards and remedies. See *Ricci* v. *Chicago Mercantile Exchange,* 409 U.S. 289 (1973).

Congress specifically authorized the SEC to allow fixed public commission rates, according to the *Gordon* case. Congress never authorized the SEC to allow nonmember brokers to be barred from participating in commissions generated by their own activities. Even though the SEC eventually became active in this area, such activity should not bar an antitrust action, where the SEC could not authorize or require the challenged application of the rule, and especially where its actions *followed* the antitrust action and were unconscionably slow and inadequate when undertaken.

CONCLUSION

Petitioners respectfully pray that a writ of certiorari issue to review the decision of the court of appeals to prevent the unjustified implied repeal of the antitrust laws required by the decision of the court of appeals and to correct its fundamental errors in construing the relationship between the antitrust laws and the Securities Exchange Act of 1934.

Respectfully submitted,

E. CAMPION KERSTEN

Attorneys for Petitioners

APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 79-2253

THILL SECURITIES CORPORATION, et al.,

Plaintiff-Appellant,

v.

THE NEW YORK STOCK EXCHANGE,

Defendant-Appellee,

and

THE UNITED STATES SECURITIES AND EXCHANGE COMMISSION,

Intervening Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 63-C-264—JOHN W. REYNOLDS, *Chief Judge.*

ARGUED MAY 6, 1980 — DECIDED OCTOBER 20, 1980

Before PELL, *Circuit Judge,* NICHOLS, *Associate Judge,** and CUDAHY, *Circuit Judge.*

* Associate Judge Philip Nichols of the United States Court of Claims is sitting by designation.

PELL, *Circuit Judge.* The plaintiff in this action, Thill Securities Corporation (Thill), is again before this court in its challenge to the New York Stock Exchange's now-revoked anti-rebate rule.[1] The rule actually was a part of the Exchange's rule which, prior to its repeal, fixed all commissions charged on the floor of the Exchange. The text of the entire rule, with the challenged portions italicized, provides:

> Sec. 1. Commissions shall be charged and collected upon the execution of all orders for the purchase or sale for the account of members or allied members or of parties not members or allied members of the Exchange, of securities admitted to dealings upon the Exchange and these commissions shall be at rates not less than the rates in this Article prescribed; *and shall be net and free from any rebate, return, discount or allowance made in any shape or manner, or by any method or arrangement direct or indirect. No bonus or percentage or portion of a commission, whether such commission be at or above the rates herein established, or any portion of a profit except as may be specifically permitted by the Constitution or a rule adopted by the Board of Governors, shall be given, paid or allowed directly or indirectly, or as a salary or portion of a salary, to a clerk or person for business sought or procured for any member or allied member of the Exchange or member firm or member corporation.*

Article XV, § 1 of the Constitution of the New York Stock Exchange.

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[1] The plaintiffs also challenged the Exchange's subsequent decision to provide non-member broker-dealers with economic access to the Exchange through a 40% reduction in commission rates. *See* discussion, *infra.* Because the anti-rebate rule as originally applied and as applied with the 40% discount are equally subject to the discussion in the text, we shall treat both challenges as resolved by that discussion.

Thill's complaint was filed in the district court in 1963 and claimed that the anti-rebate rule violated Sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1, 2, and Section 4 of the Clayton Antitrust Act, 15 U.S.C. § 15. In August of 1969, the district court granted summary judgment against Thill, holding that the rule was a method of regulating commission rates and that the Securities and Exchange Commission (SEC) had sufficiently exercised its powers of supervision[2] over the Exchange's commission rate system to require immunity. *Thill Securities Corp.* v. *N.Y.S.E.*, 1969 Trade Cases (CCH) ¶ 72,911 at 87,490 (E.D. Wis. 1969). On appeal, this court reversed and held that the factual record was insufficient to support summary judgment. 433 F.2d 264 (7th Cir. 1970), *cert. denied,* 401 U.S. 994 (1971). This court found that further factual investigation was required to determine, among other things, the degree to which the SEC was in fact exercising its supervisory powers and whether the rule was necessary to "make the Securities and Exchange Act work."[3] *Id.* at 269-70. This court did

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[2] Sections 19(b)(9) and (13) of the Securities and Exchange Act of 1934, 15 U.S.C. §§ 78(s)(b)(9) and (13), prior to their amendment in 1975, provided:

> The Commission is . . . authorized . . . [to] order [an Exchange] to alter or supplement [its] rules (insofar as necessary or appropriate to effect such changes) in respect to such matters as . . . (9) the fixing of reasonable rates of commission, interest, listing, and other charges . . . and (13) similar matters.

[3] This phrasing of the requirement of "necessity" of the rule was specifically rejected by the Supreme Court in *Gordon* v. *N.Y.S.E.*, 422 U.S. 659 (1975), when it stated:

> To the extent that the Court of Appeals in *Thill* viewed the question of implied repeal as a question of fact, concerning

(footnote continued)

not disagree, however, with the district court's finding that the rule was an integral part of the Exchange's fixing of reasonable rates of commission within the meaning of § 19(b)(9) of the 1934 Securities Exchange Act. *See* note 3, *supra*.

Following the remand, the district court granted petitions to intervene by the Securities Exchange Commission and the United States. The SEC argued that it was actively engaged in reviewing the anti-rebate rule as part of its review of the overall fixed commission rate system and that the court should therefore not engage in an antitrust analysis which might interfere with the Commission's review. The United States, on the other hand, contended that the court should review and enjoin the operation of the anti-rebate rule as violative of the antitrust laws.

After the trial was concluded and while the district court had the case under advisement, the Supreme Court

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(footnote continued)

> whether the particular rule itself is necessary to make the Act work, we decline to follow that lead.

Id. at 687.

> . . . On one hand, there is the factual question of whether fixed commission rates are actually necessary to the operation of the exchanges as contemplated under the Securities Exchange Act. On the other hand, there is the legal question as to whether allowance of an antitrust suit would conflict with the operation of the regulatory scheme which specifically authorized the SEC to oversee the fixing of commission rates. The factual question is not before us in this case. Rather, we are concerned with whether antitrust immunity, as a matter of law, must be implied in order to permit the Exchange Act to function as envisioned by the Congress. The issue of the wisdom of fixed rates becomes relevant only when it is determined that there is no antitrust immunity.

Id. at 688.

rendered its decision in *Gordon* v. *The New York Stock Exchange,* 422 U.S. 659 (1975). In *Gordon,* the Court found that the Exchange system of fixed rates of commission was within the exclusive jurisdiction of the SEC under § 19(b)(9), and, therefore, was not subject to attack under the antitrust laws. In the light of *Gordon,* the Government's intervening complaint for injunctive relief in this case was dismissed without objection.

In August of 1979, after a significant delay, the district court found *Gordon* dispositive of the other issues in this case and dismissed Thill's complaint. 473 F.Supp. 1364 (E.D. Wis. 1979). In its thorough and well-reasoned opinion, the court reaffirmed its eariler decision that the anti-rebate rule was an "integral part" of the fixed commission rate system which had been granted antitrust immunity in *Gordon.* Moreover, it held that, as in *Gordon,* the evidence established that the SEC did, in fact, adequately exercise its regulatory authority. The court then concluded that the anti-rebate rule was therefore immune from antitrust analysis. It is from this decision that Thill appeals.

A complete recitation of the factual background of this case is not necessary as a concise summary was given by this court in its prior opinion. It is sufficient to say that Thill contends that the members of the Exchange engaged in an unlawful and unreasonable combination and conspiracy in restraint of interstate trade and commerce, and unlawfully and unreasonably monopolized the securities market in the United States.[4] The Exchange members

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[4] Thill also complained that the members of the Exchange engaged in pirating non-members' customers and unfair advertising practices which have exacerbated the effects of the anti-rebate rule. In light of our decision regarding the rule itself, we, as did the district court, decline to investigate these appendant practices.

(hereinafter referred to collectively as the Exchange) allegedly accomplished this result by enforcing the rule which prohibits any member from sharing with, or rebating to, a non-member any of the commissions earned on a securities transaction occurring on the floor of the Exchange, even though that non-member might be a broker-dealer who furnished the order or provided other valuable services or assistance in the execution of the order. In essence, Thill challenges the fact that the anti-rebate rule did not incorporate an exception for non-member broker-dealers. Thill's argument assumes without justification that the purpose of the fixed rate system was to fix only the rates charged to the non-broker-dealer public and concludes, relying upon the language in *Gordon,* that the rule which fixes the rate charged to broker-dealers was not "necessary" to achieve this end. Thill also bases its challenge on a "premise" it gleans from *Silver* v. *N.Y.S.E.,* 373 U.S. 341 (1963), that "when a private group exercises joint control over access to an organized market crucial to doing business, access to that market must be made available to all in the trade."

The problem with Thill's position is that it misinterprets the requirement of "necessity" posited in *Gordon, see* note 3, *supra,* and overlooks the central issue in this case. The substantive question of whether or not the rule as written would have been violative of the antitrust laws is not properly before this court if, as was twice held by the district court, the SEC explicity or implicitly approved the rule pursuant to its statutory authority granted in the 1934 Act. As the Supreme Court stated in *Gordon,* "[t]he wisdom of the [rule] becomes relevant only when it is determined that there is no antitrust immunity." 422 U.S. at 688. It is to the immunity question, therefore, that we now turn.

The general principles applicable to issues of antitrust immunity have been well-established by the Supreme Court. In *Silver, supra,* for example, the Court addressed itself to a decision by the Exchange, reached without the benefit of a public hearing or notice to the affected parties, which disallowed direct wire connections between its members on the floor and non-member brokers. The Exchange claimed immunity from antitrust analysis, contending that its decision was protected under provisions of the 1934 Exchange Act which granted it the power to regulate, in various ways, the relationships between members and non-members, and granted the SEC the power to review all Exchange rules governing these relationships. The Supreme Court discussed the development of the preference expressed in the 1934 Act for Exchange self-regulation, but noted that although the SEC had the power to review certain Exchange rules, thus granting antitrust immunity, the Commission did not have the power to review and approve specific applications by the Exchange of these general rules. The Court held that because the Exchange's no-wire directive properly belonged in this latter class, the SEC did not have exclusive jurisdiction under the Exchange Act. Given the "fundamentally unfair manner" in which the Exchange had applied its rules, the Court held that the order was subject to attack under the antitrust laws.

Gordon, supra, continued the resolution of the conflict between the antitrust goals and the Exchange Act's allowance of certain anti-competitive conduct, specifically with regard to the Exchange Act's countenance of fixed commission rates. It is interesting to note that the plaintiffs in that case also originally challenged the Exchange's rule under attack here which disallowed discounted commission rates to non-members utilizing the Exchange facilities. In

its opinion, the Court noted that repeal of the antitrust laws is not favored nor casually allowed, and engaged in a detailed history of the growth of the fixed-rate system and of the SEC's exercise of its statutory power to review and supervise that system. The test to be applied, the Court held, was "whether implied repeal of the antitrust laws is necessary to make the Exchange Act provisions work," *id.* at 686. Relying upon 1 § 19(b)(9), the Court concluded that the case involved "explicit statutory authorization for SEC review of all exchange rules and practices dealing with rates of commission and resultant SEC continuing activity." 422 U.S. at 685. Given the SEC's explicit and implicit approval of the fixed rate structure pursuant to explicit statutory authority and the obvious interference an antitrust action would have had upon the Exchange Act's regulatory scheme, immunity from the antitrust action was held to be implied in the Exchange Act.

A recent case utilizing this analysis is *Abbott Securities Corp.* v. *N.Y.S.E.*, 384 F.Supp. 668 (D.D.C. 1974), where the court found antitrust immunity for the Exchange's 1968 prohibition of customer directed "give-ups."[5] The

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[5] "Give-ups" involved the payment by an executing broker to another broker-dealer, who may have had nothing whatsoever to do with the transaction, of a part of the commission charged to the customer for executing the order. They were directed by customers and used primarily by managers of mutual funds to reward broker-dealers, including non-members, for their sales efforts in selling mutual fund shares. Because the Commission believed that the practice produced a conflict between the interest of mutual fund shareholders in lower commission charges and the interest of mutual fund advisors and underwriters in stimulating the sales of additional shares in order to obtain the give-ups, the Exchange discontinued the practice on December 5, 1969.

plaintiffs there challenged, *inter alia*,[6] the Exchange's ban on non-member economic access which occurred between the time the give-ups were outlawed by the Exchange on December 5, 1969, and the time the 40% reduction in commissions charged to non-member broker-dealers was adopted in 1972. After discussing the holding in *Silver, supra*, the court stated:

> Since it is a fact that the issue of economic access to non-member broker-dealers is inextricably intertwined with the practice of fixing commission rates . . . and further that the SEC had review jurisdiction of this conduct pursuant to § 19(b) of the 1934 Securities Exchange Act, we find as a matter of law that the defendant is immune from the operation of the antitrust laws for the alleged conduct. . . .

384 F.Supp. at 670.

The district court in the instant action employed a similar analysis to find immunity. Relying upon a factual finding that the anti-rebate rule was an integral part of the fixed commission rate system and accepting the history of the SEC's review of the system set forth in *Gordon*, the court found *Gordon* dispositive and immunity required.[7]

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[6] The court at first granted a trial on the claim that the Exchange enforced the anti-rebate rule with predatory intent, but later reversed itself in light of the later-decided *Gordon*, holding that the Exchange enjoyed total immunity from the operation of the antitrust laws irrespective of the Exchange's intent. *Abbott Securities Corp.* v. *N.Y.S.E.*, 1976-2 Trade Cases (CCH) ¶ 61,017 (D.D.C. 1976), *aff'd*, 569 F.2d 159 (D.C. Cir. 1977).

[7] Given the SEC's adoption of Rule 19-b-3, 17 C.F.R. § 240.196.3, which required the elimination of all fixed-rate commissions as of May 1, 1975, the district court dismissed plaintiff's complaint for

(footnote continued)

We fully subscribe to the district court's analysis and conclusions in the present case. Whether viewed as a factual finding calling for the application of the clearly erroneous standard or otherwise, it is clear that the anti-rebate rule was an integral part of the entire fixed-commission rate system. The rule in fact is simply descriptive clauses in the very Exchange rule providing for the fixed rates. Not only was the anti-rebate rule, therefore, implicity subject to SEC review and approval each time the Commission reviewed the Exchange's proposed rate increases between 1934 and 1968, but it was also specifically discussed by the SEC in its "Report of Special Study of Securities Markets," H.R. Doc. No. 95, 88th Cong., 1st Sess. (1963), issued prior to the initiation of this lawsuit, where the Commission stated:

> Under the public commission schedule of the NYSE, a non-member broker must pay a member the same commission that his customer must pay if he were to place the order directly with a member.

The Study identified a number of ways non-members had secured indirect access to the Exchange, including give-ups and other reciprocal business practices,[8] and concluded that the issue of non-member access was "far too com-

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(footnote continued)

injunctive relief as moot. Though this conclusion would seem warranted, *see Diffenderfer* v. *Central Baptist Church*, 404 U.S. 412 (1972), we need not decide this question in light of our decision on the merits of the damage counts, which is equally applicable to the request for an injunction.

[8] A member desiring to reciprocate for commission business given to him by a non-member broker-dealer could do so by referring to the non-member the opportunity to earn a commission in a trade to be executed on a regional exchange to which the non-member belonged.

plex in its own right and too involved with other complex questions to be the subject of specific recommendations of this study." The Study recommended that the issue "should be the subject of joint Commission-Exchange study, particularly with reference to problems of competition, depths of markets, and reciprocity."

The resulting joint investigations, recommendations and negotiations continued through the subsequent years, partially consisting of the Exchange's submission of proposals for limited non-member access in 1964, 1965, and 1968. All of these proposals were rejected by the Commission with specific recommendations or counter-proposals. In its replies, the Commission expressed its belief that non-member broker-dealers who caused their customer's orders to be brought on the floor through a member were entitled to compensation for their services, but also noted its concern that "[i]f . . . arrangements are made for such sharing of commissions, they should be so confined that they cannot be used as a vehicle for perpetuating or extending improper give-up practices."

The record reveals that the anti-rebate rule was consistently treated by the SEC as a component of the fixed commission rate system. Combined with the detailed analysis in *Gordon*, it establishes that the SEC fully exercised its statutory jurisdiction to review the rule as an integral part of the rate structure, including the analysis of antitrust considerations. In such circumstances, there can be little question that immunity from the obvious interference separate private antitrust actions would cause was intended in the Exchange Act.

As stated above, it is clear that the Thill's true complaint goes to the substance of the rule. Its argument that fixing the commission rate on non-member broker-dealers

was not "necessary" to maintain the statutorily-authorized fixed "public" rates is really a substantive attack on the rule's failure to except non-member broker-dealers from the anti-rebate provisions, couched in the language utilized in *Gordon*. However, this argument begs the question before the court because we must first ask whether the rule *as written* was reviewed by the SEC pursuant to statutory authority. Once *given* the rule's reviewed proviso that the proper distinction to be drawn between those who may and may not receive discounts is between members and non-members of the Exchange and not, as Thill would prefer, between broker-dealers and other members of the public, it is obvious that to allow any non-member rebates would have destroyed the established system of fixed rates. It therefore follows that the distinction *as set forth in the rule* was an integral and essential part of the entire fixed rate system for, as the district court held, without the anti-rebate provision, the fixed rates as established would not have been fixed. Thill's attack on the *wisdom* of the distinction drawn in the rule, therefore, which is in actuality an attack on the fixed rate system itself, must fail in light of the immunity provided in *Gordon*.[9] The district court, therefore, is

AFFIRMED.

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[9] We find unpersuasive the appellant's argument that *Gordon* is distinguishable in light of that opinion's distinguishing of this court's prior opinion in *Thill (Thill I)*. *Gordon* was before the Supreme Court, as was *Thill I* before this court, on appeal from a grant of summary judgment to the Exchange. The Government in *Gordon*, relying upon *Thill I*, argued that the factual record was inadequate to support summary judgment and requested a remand. The Court disagreed, finding the record adequate, and distinguished *Thill I* on three grounds. First, the Court found that there was no evidence

(footnote continued)

CUDAHY, *Circuit Judge* Concurring.

As a matter of elementary economics it is difficult for me to see why a blanket anti-rebate rule was "necessary" or "integral" to a system of maintaining fixed commissions for *investors*. And we may assume, in this context at least, that the Securities and Exchange Act was enacted for *investor* benefit. An effect of the anti-rebate rule was to tie the public (ultimate consumers) and the non-member broker-dealers (middlemen) to the same rate structure, thus effectively squeezing or squeezing out these middlemen with no apparent benefit to the public. The rule as applied to non-member broker-dealers seem-

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(footnote continued)

in *Thill I* regarding the extent of the SEC actual review of the anti-rebate rule. Second, the Court noted that the anti-rebate practice, unlike the fixed rate system itself was not specifically mentioned in the Exchange Act although, as the Court stated, "the practice might reasonably be thought to be related to the fixing of commission rates." Last, the Court mentioned that the anti-rebate practice "does not necessarily apply uniformly and may be applied in a discriminatory manner."

We believe the record after trial in this case now supports the Exchange's position. As noted above, there is substantial and sufficient evidence establishing the adequacy of the SEC's review of the anti-rebate practice and the rule was well established to be an integral part of the rate structure. Furthermore, the appellant presented inadequate evidence that the rule was ever applied in a discriminatory manner. Thill's attempt to establish discrimination by pointing out that the rule applied only to non-members clearly is inapposite in light of the immunity this substantive portion of the rule enjoys, and its argument that discrimination existed due to the discretionary manner the reciprocal and give-up practices were administered is similarly irrelevant as those practices were themselves the subject of SEC review, *see Abbott, supra,* were outlawed by the Exchange, and are simply unconnected to the anti-rebate rule challenged here.

ingly had no effect on the public except to limit the number of broker-dealers who could economically transact New York Stock Exchange business for investors. This limitation was presumably a detriment to the investing public.

But, despite these reservations, I accept Judge Pell's conclusions as dictated in part by the findings of the district court and, above all, by the pointed language of the Supreme Court in *Gordon* v. *New York Stock Exchange:*

> "We do not believe it necessary, in the circumstances of this case, to take further evidence concerning the competitive effects of fixed rates, or the necessity of fixed rates as a keystone of the operation of exchanges under the Exchange Act. To the extent that the Court of Appeals in *Thill* viewed the question of implied repeal [of the antitrust laws] as a question of fact, concerning whether the particular rule itself is necessary to make the Act work, we decline to follow that lead.
>
> . . . .
>
> The issue of the wisdom of fixed rates becomes relevant only when it is determined that there is no antitrust immunity."

422 U.S. 659 at 687, 688.

A true Copy:
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Clerk of the United States Court of Appeals for the Seventh Circuit

THILL SECURITIES CORPORATION et al.,

Plaintiff,

v.

The NEW YORK STOCK EXCHANGE,

Defendant,

United States of America and United States Securities and Exchange Commission,

Intervening Defendants.

Civ. A. No. 63-C-264.

United States District Court, E. D. Wisconsin.

Aug. 15, 1979.

DECISION AND ORDER

REYNOLDS, Chief Judge.

This is an action for treble damages and for injunctive and declaratory relief brought pursuant to §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and § 4 of the Clayton Act, 15 U.S.C. § 15. The plaintiff Thill Securities Corporation ("Thill") was a registered broker-dealer in securities. The plaintiff has gone out of business since the suit was commenced. The defendant is the New York Stock Exchange ("Exchange"). The basic issues raised by the suit are described in *Thill Securities Corporation* v. *New York Stock Exchange*, 433 F.2d 264, 266-267 (7th Cir. 1970), cert. denied 401 U.S. 994, 91 S.Ct. 1232, 28 L.Ed.2d 532 (1971):

> "Plaintiff Thill Securities Corporation, ('Thill') is a licensed securities dealer-broker, registered with the

Securities and Exchange Commision, and a member in good standing of the National Association of Securities Dealers, Inc., but is not a member of the New York Stock Exchange. It brings this action on its own behalf and on behalf of all other securities dealers and brokers similarly situated, being those who are not members of the New York Stock Exchange and who are denied access to the auction market and trading facilities of the Exchange except through one of its members. In its complaint Thill charges the Exchange with substantial anti-competitive conduct in violation of the antitrust laws of the United States. Sherman Antitrust Act, § 1 and § 2, 15 U.S.C. § 1 and § 2; and Clayton Act, § 4, 15 U.S.C. § 15. Specifically, Thill charges that the Exchange has engaged in an unlawful and unreasonable combination and conspiracy in restraint of interstate trade and commerce and has unlawfully and unreasonably monopolized the securities market in the United States by among other things adopting, subscribing and adhering to a rule which prohibits any member of the Exchange from sharing any commission earned from the purchase or sale of securities with a non-member, even though the non-member may have furnished the order; and by discriminately discouraging customers and prospective customers of Thill and other non-members from doing business with non-members.

"Thill alleges that as a proximate result of the unlawful and monopolistic rules and practices of the Exchange, it and other non-members of the Exchange are totally deprived of commissions or other fair compensation on transactions which they have initiated and serviced. It further alleges that the intended necessary and actual effect of this unlawful conduct is to restrain trade by preventing any competition by and between members of the Exchange and non-member securities dealers and brokers. Thill alleges to have suffered damages in the amount of seven million dollars, for which it seeks treble damages ($21,000,000) under the antitrust laws. It also seeks a declaratory

judgment that the Exchange's prohibition against sharing of commission's constitutes a violation of the antitrust laws; and an injunction prohibiting the Exchange from enforcing the prohibition. Subsequent to the filing of this action, Thill Securities Corporation went out of business.

"The defendant Exchange does not contest the anti-competitive effects of its rule prohibiting the sharing of commissions—sometimes referred to as the anti-rebate rule. At oral argument its counsel admitted, as is obvious, that the conduct complained of would constitute a violation of the anti-trust laws, were those statutes applicable to the activities of the Exchange in this case. Its position is that the Sherman Act does not apply to the rule of the Exchange prohibiting the sharing of commissions by members with non-members. It contends that this broad immunity is enjoyed by virtue of the Securities Exchange Act of 1934 (15 U.S.C. § 78a et seq.) which authorizes registered national securities exchanges to adopt rules in respect to the 'fixing of reasonable rates of commision' subject to review and revision by the Securities Exchange Commission under section 19(b) of the Act. 15 U.S.C. § 78s(b). It also contends that the SEC has and is exercising exclusive review jurisdiction over such rules of the Exchange, and that its conduct is thus immune from antitrust liability. This immunity, in its view, extends beyond the 'fixing of reasonable rates of commission' and include rules relating to the 'sharing' of commissions, because the prohibition against sharing of commissions with nonmember broker dealers is an integral part of the 'fixing of reasonable rates'."

On August 26, 1969, this Court granted summary judgment to the defendant on the basis that the prohibition against the sharing of commissions (the "antirebate rule") is a method of regulating commission rates and thus an integral part of the fixing of commissions, that the Securities and Exchange Commission ("SEC") is exercising its powers of supervision over the commission structure of the

Exchange, and therefore that the rule is exempt from the operation of the antitrust laws and it would be improper for the court to review the reasonableness of the antirebate prohibition. *Thill Securities Corporation* v. *New York Stock Exchange,* 1969 Trade Cases § 72,911 at 87,490. The Seventh Circuit reversed and remanded the case for trial, holding that there was an issue of fact as to whether the SEC was exercising its supervisory authority in the matter of commissions and that, even if it were, the Court must then decide whether the antirebate rule is necessary to effectuate the purpose of the Securities Exchange Act of 1934 before an exemption from the antitrust laws could be found:

> "Before the investing public of the United States may be deprived of the benefit of competition through the vehicle of Exchange rules, it must be established that the Exchange's exemption from the antitrust laws is necessary to discharge its responsibilities under the Securities Exchange Act. [Citations omitted.] In short, its exemption must be based on a showing of true necessity. As applicable here, it must be established that subjecting the antirebate rule to antitrust attack will frustrate the purpose of the Securities Exchange Act or make it substantially ineffective. * * *
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> "In the record before us there is no evidence, save for the allegations of plaintiff, as to the effects of the anticompetitive conduct complained of; there is no evidence as to the extent to which the challenged rule is subject to actual review by the SEC; there is no evidence as to what in the regulatory scheme 'performs the antitrust function'; and, most notably, there is no evidence as to why the antirebate rule must be preserved as 'necessary to make the Securities Exchange Act work.' * * *" 433 F.2d, at 269-270.

In the course of its decision the Seventh Circuit did not disagree with this Court's prior finding that the antirebate

rule is an integral part of the "fixing of reasonable rates of commission" within the meaning of § 19(b)(9) of the Securities Exchange Act of 1934, 15 U.S.C. § 78s(b)(9). See *Thill Securities Corporation* v. *New York Stock Exchange,* 1969 Trade Cases § 72,911 at 87,490; Pell, J., concurring in part and dissenting in part, 433 F.2d at 277-278.

Following the remand, the Court granted petitions by the SEC and the United States to intervene in the action. Trial commenced on November 27, 1972, and was concluded on February 28, 1973. On June 11, 1973, the Court ordered the preparation of proposed findings of fact and conclusions of law, and the action was taken under advisement. Thereafter, on June 26, 1975, the United States Supreme Court issued its decision in *Gordon* v. *New York Stock Exchange,* 422 U.S. 659, 95 S.Ct. 2598, 45 L.Ed.2d 463 (1975), holding that the system of fixed commission rates for members of the Exchange is exclusively within the jurisdiction of the SEC under § 19(b)(9) of the Securities Exchange Act of 1934, 15 U.S.C. § 78s(b)(9), and not subject to attack under the antitrust laws. On January 23, 1975, the SEC issued an opinion adopting Rule 19b-3, effective May 1, 1975, which rule requires the elimination of all fixed non-member commission rates for transactions on the Exchange and therefore moots the injunctive portion of the complaint in this action. On September 22, 1975, the plaintiff Thill filed a motion to dismiss the complaint of the intervenor United States. By letter dated August 1, 1975, the United States notified the Court that it did not oppose the motion, since in light of the *Gordon* decision and the amendment of the Securities Exchange Act, effective June 5, 1975, P.L. 94-29, the injunctive relief requested by the United States was no longer necessary or appropriate. The Court will grant the motion to dismiss.

In *Gordon,* the Supreme Court reviewed at length the history of SEC regulation of the Exchange's system of fixed commission rates. It also noted congressional reaffirmation of the SEC's supervisory authority through the enactment of Public Law 94-29, effective June 5, 1975, which amended § 19(b) of the Securities Exchange Act and codified SEC Rule 19b-3 (referred to in the preceding paragraph), part of the effect of which rule was to eliminate fixed nonmember commission rates. The Court concluded as follows:

> "* * * In contrast to the circumstances of *Silver* [v. *New York Stock Exchange,* 373 U.S. 341, 83 S|Ct. 1246, 10 L.Ed.2d 389 (1963)], § 19(b) gave the SEC direct regulatory power over exchange rules and practices with respect to 'the fixing of reasonable rates of commission.' Not only was the SEC authorized to disapprove rules and practices concerning commission rates, but the agency also was permitted to require alteration or supplementation of the rules and practices when 'necessary or appropriate for the protection of investors or to insure fair dealings in securities traded in upon such exchange.' Since 1934 all rate changes have been brought to the attention of the SEC, and it has taken an active role in review of proposed rate changes during the last 15 years. Thus, rather than presenting a case of SEC impotence to affect application of exchange rules in particular circumstances, this case involves explicit statutory authorization for SEC review of all exchange rules and practices dealing with rates of commission and resultant SEC continuing activity.
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> "* * * [W]e must then make inquiry as to the proper reconciliation of the regulatory and antitrust statutes involved here, keeping in mind the principle that repeal of the antitrust laws will be 'implied only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary.' 373 U.S., at 357, 83 S.Ct. 1246-47, 1257. We hold that these requirements for implied repeal are

clearly satisfied here. To permit operation of the antitrust laws with respect to commission rates, as urged by petitioner Gordon and the United States as *amicus curiae*, would unduly interfere, in our view, with the operation of the Securities Exchange Act." 422 U.S., at 685-686, 95 S.Ct., at 2612-13.

The Supreme Court also discussed the Seventh Circuit's decision in *Thill*:

"Our disposition of this case differs from that of the Seventh Circuit in *Thill Securities Corp.* v. *New York Stock Exchange*, 433 F.2d 264 (1970), cert. denied, 401 U.S. 994, 91 S.Ct. 1232, 28 L.Ed.2d 532 (1971), where antitrust immunity for the NYSE's antirebate rule was claimed and denied. The Court of Appeals reversed a grant of summary judgment in favor of the NYSE, and remanded for further evidence regarding the effects of the antirebate rule on competition, the degree of actual review by the SEC, and the extent to which the rule was necessary to make the Exchange Act work. 433 F.2d, at 270. This ruling is persuasively distinguishable on at least two grounds from the case at bar: First, there was no evidence presented regarding the extent of SEC review of the challenged rule. Second, the antirebate practice differs from fixed commission rates in that (1) it was not among the items specifically listed in § 19(b), although the practice might reasonably be thought to be related to the fixing of commission rates, and (2) it does not necessarily apply uniformly, and may be applied in a discriminatory manner. We do not believe it necessary, in the circumstances of this case, to take further evidence concerning the competitive effects of fixed rates, or the necessity of fixed rates as a keystone of the operation of exchanges under the Exchange Act. To the extent that the Court of Appeals in *Thill* viewed the question of implied repeal as a question of fact, concerning whether the particular rule itself is necessary to make the Act work, we decline to follow that lead." 422 U.S., at 686-687, 95 S.Ct. at 2613-14.

This Court found in its decision and order issued August 26, 1969, granting summary judgment to the Exchange, that the antirebate rule has an integral relationship to the fixing of commission rates and that the SEC possessed the authority to regulate and to review the antirebate rule. On further review of the issues raised in this action in light of the *Gordon* decision, and in light of the extensive record compiled in this action, the Court is persuaded that its previous findings were correct, and it is further persuaded that the SEC did in fact exercise its regulatory authority. See also *Abbott Securities Corp.* v. *New York Stock Exchange,* 384 F.Supp. 668 (D.D.C. 1974), aff'd, 186 U.S.App.D.C. 328, 569 F.2d 159 (1977), wherein the Court, in reviewing a challenge under the antitrust laws to the antirebate rule of the New York Stock Exchange, found that the rule was "inextricably intertwined with the practice of fixing commission rates," that it was subject to review and was in fact reviewed by the SEC, and therefore that the *Gordon* decision was dispositive. The existence and actual exercise of the SEC's regulatory authority precludes the Court from considering under the antitrust laws whether the rule was in fact applied by the Exchange in a discriminatory manner. See *Gordon,* supra, 422 U.S. at 684, 95 S.Ct. at 2612, where the Court distinguished *Silver,* supra, because the SEC lacked authority to regulate the application of the rule at issue in that case, and therefore "could not prevent application of the rules that would have undesirable anticompetitive effects; there was no governmental oversight of the exchange's self-regulatory action, and no method of insuring that some attention at least was given to the public interest in competition."

The antirebate rule was in fact consistently treated by the SEC as a component of the fixed commission rate

structure. Therefore, the history of SEC review and regulation of the fixed commission rate structure set forth in *Gordon* is equally applicable to the antirebate rule. Thus, once the Court makes the findings, as it now does, that the SEC possessed the authority to regulate and review the antirebate rule and that it consistently treated the rule in conjunction with the fixed commission rate structure, *Gordon* is dispositive of the complaint.

More specifically, based on the trial record, the Court makes the following findings of fact:

1. The Exchange was founded in 1792. Its principal activity has long been, and still is, to provide for its members and member organizations and their customers a two-way auction market in securities admitted to trading on the Exchange. (D. Ex. 760, ¶ 2.)

2. From its founding until May 1, 1975, the Exchange continuously had rules fixing the minimum commission rates to be charged by its members to nonmembers, including nonmember brokers and dealers, on transactions in securities listed on the Exchange. Those rules at all times prior to 1972 included language prohibiting any rebates, discounts, or allowances made in any shape or manner. After March 1972, members were permitted to grant to non-member broker-dealers a discount of up to a maximum of 40% from the minimum required to be charged the investing public. (Gray, Tr. 129-130; D. Ex. 661, Part 2 at 294-327; D. Ex. 663.)

3. The antirebate provision was an essential part of the rule fixing minimum commissions and necessary to make the latter rule work, since without it the rates fixed would not have been minimums. (Rotberg, Tr. 4565; Pollack, Tr. 3491; West, Tr. 3793; Davant, GX 1553, p. 3; Regan, GX 1568, p. 3.)

4. The provision prohibiting any rebate or discount from the fixed minimum commission was not challenged by the SEC when it reviewed each of the five modifications which the Exchange effected in its rules with respect to commission rates in 1938, 1942, 1947, 1953, and 1958. (D. Ex. 661, Part 2 at pp. 328-333; D. Ex. 760.)

5. The principal change effected by each of the rate schedule modifications between 1934 and 1958 was an increase in the level of rates, although in 1953 and 1958, limited changes were also made in the rate structure. In each instance, the SEC reviewed the proposed change. In some instances the changes were permitted to stand without modification. In 1942 and 1958, however, the SEC requested the Exchange to make certain modifications, and the Exchange complied. (D. Ex. 661, Part 2 at 329-333; Gray, Tr. 138-139.)

6. At the time of the proposed change in commission rates in 1958, the SEC ordered an inquiry into whether such rates "appear to be reasonable and in accordance with the standards contemplated by the applicable provisions of the Securities Exchange Act of 1934." After completion of its study, the SEC requested the Exchange to reduce certain commission rates at the lower range of the scale and to eliminate the "round turn" discounts adopted in 1953. (D. Ex. 661, Part 2 at 329-333; D. Ex. 760, Exh. D; GX 1475.)

7. In 1963 the SEC, in its Special Study, concluded that the question of nonmember access was to complex and too involved with other questions raised by the Exchange's minimum rate structure to be the subject of specific recommendations at that time, and recommended instead that it should be the subject of joint SEC-Exchange study. (D. Ex. 661, Part 2 at 349-350.)

8. In the fall of 1964, in response to a request by the SEC, the Exchange submitted to the SEC the first of its proposals with respect to nonmember broker access. (Calvin, Tr. 1534-1535, 1587; D. Ex. 649.)

9. This was followed in November 1965 by a proposal by the Exchange that non-member brokers be granted a discount of 25%. (D. Ex. 510; Calvin, Tr. 1554-1555.)

10. Discussions between the SEC and the Exchange with respect to nonmember access continued throughout 1966, 1967, and into 1968. (Calvin, Tr. 1559; see, Pollack, Tr. 3471; see also D. Ex. 498; F. Wheat, Tr. 2235-2238, 2364; Rotberg, Tr. 4366-4368.)

11. In July 1968, the SEC commenced extensive public hearings designed to investigate, *inter alia,* the possibility of nonmember access. The hearings lasted for some two years and were participated in by 80 different organizations and approximately 150 witnesses. (D. Ex. 66; Calvin, Tr. 1620.)

12. At the conclusion of the hearings, in a letter dated October 22, 1970, the SEC requested the Exchange to submit to it for consideration no later than June 30, 1971, a new proposal for reasonable nonmember access. (Calvin, Tr. 1633; D. Ex. 495; see D. Ex. 13, D. Ex. 551; Calvin, Tr. 1642-1644.)

13. The access proposals made by the Exchange were the subject of further public hearings conducted by the SEC in July and October of 1971. (Freund, Tr. 2701.)

14. Following these hearings and the resolution of certain differences between the Exchange and the SEC, the Exchange amended its rules fixing minimum commissions so as to permit a discount of up to 40% to be allowed to qualified nonmember brokers. This amendment became

effective in March 1972. (Calvin, Tr. 1671-1672; 1681-1682; D. Ex. 159; D. Ex. 558; D. Ex. 162.)

15. The evidence in the record, taken as a whole, establishes that the provision of the Exchange rule fixing minimum commissions which prohibited rebates or discounts from the minimum to be charged was, at all times relevant to this suit, the subject of actual review by the SEC, exercising its jurisdiction under § 19(b)(9) of the Exchange Act, 15 U.S.C. § 78s(b)(9).

As stated above, once the Court concludes that the antirebate rule was an integral part of the fixed commission rate structure and that it was subject to review and regulation by and was in fact reviewed and regulated by the SEC, then it follows as a matter of law, under the decision in *Gordon* v. *New York Stock Exchange,* 422 U.S. 659, 685-686, 95 S.Ct. 2598, 45 L.Ed.2d 463 (1975), that to allow the operation of the antitrust laws with respect to the antirebate rule would unduly interfere with the operation of the Securities Exchange Act, and, therefore, because the antirebate rule is exempted from the coverage of the antitrust laws, that the complaint fails to state a claim upon which relief can be granted and must be dismissed.

IT IS THEREFORE ORDERED that judgment be entered in favor of the defendant the New York Stock Exchange and the intervenor the Securities and Exchange Commission dismissing the plaintiff's complaint with prejudice.

IT IS FURTHER ORDERED that the motion of the plaintiff Thill Securities Corporation to dismiss the complaint of the intervenor the United States with prejudice is granted, and the intervenor's complaint is dismissed.

THILL SECURITIES CORPORATION, etc.,
Plaintiff-Appellant,

v.

The NEW YORK STOCK EXCHANGE,
Defendant-Appellee.

No. 18036.

United States Court of Appeals, Seventh Circuit.

August 27, 1970.

Rehearing Denied November 18, 1970.

Before SWYGERT, Chief Circuit Judge, PELL, Circuit Judge and CAMPBELL, Senior District Judge.*

CAMPBELL, District Judge.

The basic question presented here is whether stockbrokers who are members of the New York Stock Exchange should continue to enjoy their self-acquired freedoom from competition by stockbrokers who are not members. Using the vehicle of Stock Exchange rules, members seem effectively to have negated the congressionally mandated principle of competition as it would otherwise apply to them.

The New York Stock Exchange ("Exchange") is the largest organized securities market in the United States. Its dominance of the securities industry is a well known and commonly accepted commercial and historical fact. It transacts well over 70 per-cent of the dollar value of

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* Judge Campbell of the United States District Court for the Northern District of Illinois sitting by designation.

all stock transactions on exchanges in the United States. See, New York Stock Exchange, 1970 Fact Book. Its policies and practices have an ever increasing effect on our economy.

By the Exchange's Constitution, its membership is limited to 1366 members. In 1969 a membership sold for the record price of $515,000. Id at 55.

The Exchange is governed by a 33 man Board, consisting of 29 members elected by the membership and a president and 3 governors who are to represent the public view and who are elected by the Board. The economic power of the Exchange and its members extends well beyond the operations of the Exchange itself. As the author of a leading article explains:

> "The influence wielded by these Big Board members, along with their 'allied' brethren, reaches way beyond the NYSE: thus they comprise 23 of the 32 Governors of the American Exchange; 16 of 25 of the Midwest Exchange's Governors; 8 out of 11 for the Pacific Exchange; and 16 of the 22-man Board of the National Association of Securities Dealers, a 'self-regulatory institution for the over-the-counter markets' to which, since it bars any of its members 'from dealing with a non-member broker or dealer except at the prices * * * accorded to members of the public', for 'all practical purposes the vast majority of brokers or dealers' must belong 'in order to engage profitably in most underwritings and over-the-counter business'. Quite understandably, then, it is on the operations of the NYSE and its members that antitrust interest has so far principally focused." Bicks, Antitrust And The New York Stock Exchange, 21 Bus.Lawy. 129, 134 (1965).

In many respects the Exchange has been delegated governmental authority. Its counsel describes it as a "unique

self regulator." Under the Securities Exchange Act of 1934 (15 U.S.C. § 78a et seq.) it may adopt its own constitution and rules, and discipline violations thereof. The Securities Exchange Commission ("SEC") has the power, however, to order changes in Exchange rules respecting a number of subjects, set forth in section 19(b) of the Act.[1] 15 U.S.C. § 78s(b). Except for the limited review authority of the SEC, the Exchange's economic power in the securities field appears complete and absolute.

Plaintiff Thill Securities Corporation, ("Thill") is a licensed securities dealer-broker, registered with the Securities and Exchange Commission, and a member in good standing of the National Association of Securities Dealers, Inc., but is not a member of the New York Stock Exchange. It brings this action on its own behalf and on behalf of all other securities dealers and brokers similarly situated, being those who are not members of the New York Stock Exchange and who are denied access to the auction market and trading facilities of the Exchange except through one of its members. In its complaint Thill charges the Exchange with substantial anti-competitive conduct in violation of the antitrust laws of the United States. Sherman Antitrust Act, § 1 and § 2, 15 U.S.C. § 1 and § 2; and Clayton Act, § 4, 15 U.S.C. § 15. Specifically, Thill charges that the Exchange has engaged in an unlawful and unreasonable combination and conspiracy in restraint of interstate trade and commerce and has unlawfully and unreasonably monopolized the securities market in the United States by among other things adopting, subscribing and adhering to

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[1] There appears to be considerable doubt that the SEC has power to alter, amend or supplement Exchange rules dealing with any subject not specifically enumerated in section 19(b). See, Bicks, Antitrust And The New York Stock Exchange, 21 Bus.Lawy. 129, 137 n. 42 (1965).

a rule which prohibits any member of the Exchange from sharing any commission earned from the purchase or sale of securities with a non-member, even though the non-member may have furnished the order;[2] and by discriminately discouraging customers and prospective customers of Thill and other non-members from doing business with non-members.

Thill alleges that as a proximate result of the unlawful and monopolistic rules and practices of the Exchange, it and other non-members of the Exchange are totally deprived of commissions or other fair compensation on transactions which they have initiated and serviced. It further alleges that the intended, necessary and actual effect of this unlawful conduct is to restrain trade by preventing any competition by and between members of the Exchange and non-member securities dealers and brokers.

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[2] Article XV, § 1 of the Constitution of the New York Stock Exchange provides in part:

> "Sec. 1. Commissions shall be charged and collected upon the execution of all orders for the purchase or sale for the account of members or allied members or of parties not members or allied members of the Exchange, of securities admitted to dealings upon the Exchange and these commissions shall be at rates not less than the rates in this Article prescribed; and shall be net and free from any rebate, return, discount or allowance made in any shape or manner, or by any method or arrangement direct or indirect. No bonus or percentage or portion of a commission, whether such commission be at or above the rates herein established, or any portion of a profit except as may be specifically permitted by the Constitution or a rule adopted by the Board of Governors, shall be given, paid or allowed directly or indirectly, or as a salary or portion of a salary, to a clerk or person for business sought or procured for any member or allied member of the Exchange or member firm or member corporation."

Thill alleges to have suffered damages in the amount of seven million dollars, for which it seeks treble damages ($21,000,000) under the antitrust laws. It also seeks a declaratory judgment that the Exchange's prohibition against sharing of commissions constitutes a violation of the antitrust laws; and an injunction prohibiting the Exchange from enforcing the prohibition. Subsequent to the filing of this action, Thill Securities Corporation went out of business.

The defendant Exchange does not contest the anti-competitive effects of its rule prohibiting the sharnig of commissions—sometimes referred to as the anti-rebate rule. At oral argument its counsel admitted, as is obvious, that the conduct complained of would constitute a violation of the antitrust laws, were those statutes applicable to the activities of the Exchange in this case. Its position is that the Sherman Act does not apply to the rule of the Exchange prohibiting the sharing of commissions by members with non-members. It contends that this broad immunity is enjoyed by virtue of the Securities Exchange Act of 1934 (15 U.S.C. § 78a et seq.) which authorizes registered national securities exchanges to adopt rules in respect to the "fixing of reasonable rates of commission" subject to review and revision by the Securities Exchange Commission under section 19(b) of the Act. 15 U.S.C. § 78s(b). It also contends that the SEC has and is exercising exclusive review jurisdiction over such rules of the Exchange, and that its conduct is thus immune from antitrust liability. This immunity, in its view, extends beyond the "fixing of reasonable rates of commission" and includes rules relating to the "sharing" of commissions, because the prohibition against sharing of commissions with non-member broker dealers is an integral part of the "fixing of reasonable rates".

The district court essentially agreed with the position taken by the Exchange. It first found that the conduct complained of, i. e. the prohibition against the sharing of commissions, was one method of regulating commission rates, and as such was subject to review by the SEC under section 19(b); and that the SEC is exercising its section 19(b) power of supervision over the commission structure.

The district court then concluded that the "challenged Exchange practice, being within the scope and purpose of the 1934 Act, does not constitute a *per se* violation of the antitrust laws", and that it would not be proper to inquire into the reasonableness of the Exchange's prohibition as "the SEC is currently exercising its supervisory duty over this area of Exchange self-regulation". Accordingly, the court found no genuine issue of any material fact and entered summary judgment for the Exchange. Plaintiff Thill then took an appeal to this court.

In our consideration of the issues presented in this appeal we must begin with the teachings of the Supreme Court in Silver v. New York Stock Exchange, 373 U.S. 341, 83 S.Ct. 1246, 10 L.Ed.2d 389 (1963). The controversy in *Silver* arose from the Exchange's unilateral direction to certain of its member firms to discontinue private wire connections with the plaintiff non-member broker-dealer. This conduct, as the Supreme Court noted in its opinion, had it occurred in a context free from other federal regulations, would constitute a *per se* violation of section one of the Sherman Act. Because the activities of the Exchange are at least in part subject to the regulation of another statutory scheme, the Securities Exchange Act of 1934, the Court was confronted with the issue as to whether the Securities Exchange Act, which created a duty of Exchange self regulation, constituted an implied repealer of the antitrust laws, thereby exempting the Exchange from liability.

Upon consideration of the question, the Supreme Court soundly rejected any notion that the Exchange enjoyed blanket immunity from the enforcement of the antitrust laws simply because its activities were to a certain extent subject to the regulatory provisions of the Securities Exchange Act. On the contrary, the Court concluded that the proper approach is an *analysis* which reconciles the operation of both statutory schemes (the antitrust laws and the Securities Exchange Act) with one another rather than holding one completely ousted. In undertaking the analysis to attempt to reconcile the two statutes, courts were admonished that repeal or ouster of antitrust laws is not favored.

> "The Securities Exchange Act contains no express exemption from the antitrust laws or, for that matter, from any other statute. This means that any repealer of the antitrust laws must be discerned as a matter of implication, and '[i]t is a cardinal principle of construction that repeals by implication are not favored.' United States v. Borden Co., 308 U.S. 188, 198 [60 S.Ct. 182, 188, 84 L.Ed. 181]; see Georgia v. Pennsylvania R. Co., 324 U.S. 439, 456-457 [65 S.Ct. 716, 725-726, 89 L.Ed. 1051]; California v. Federal Power Comm'n, 369 U.S. 482, 485 [82 S.Ct. 901, 903, 8 L.Ed. 2d 54]. *Repeal is to be regarded as implied only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary.* This is the guiding principle to reconciliation of the two statutory schemes." (Emphasis supplied, 373 U.S. at 357, 83 S.Ct. at 1257)

Despite these admonitions the Exchange argues, as the court below concluded, that the antitrust court's analysis ends once it is determined that the conduct complained of, here the antirebate rule, is subject to potential review by the SEC under section 19(b).

This conclusion is said to follow from the reasoning of this court in Kaplan v. Lehman Brothers, 371 F.2d 409 (1967); affirming Kaplan v. Lehman Brothers, 250 F.Supp. 562 (N.D.Ill. 1966), which concerned the Exchange's practice of fixing minimum rates of commission. That case was brought by certain shareholders in several mutual funds who charged that the practice of the Exchange in fixing minimum commission rates constituted a price fixing conspiracy in violation of section one of the Sherman Act. 15 U.S.C. § 1. In granting summary judgment for the defendants in that case, the district court stressed the fact that the plaintiffs there had attacked the rules and the prescribed rates solely on the theory that the fixing of minimum rates of commission through the collective action of the Exchange was illegal *per se* under the Sherman Act. The court then correctly observed that as in *Silver* the conduct challenged, had it occurred in a context free from other federal regulation, would constitute a *per se* violation of section one of the Sherman Act. 373 U.S. at 347, 83 S.Ct. 1246, 10 L.Ed.2d 389. But, because of the presence of the other statutory scheme, namely the Securities Act, the conduct was not illegal *per se* but rather called for an analysis, "which reconciled the operation of both statutory schemes." Accordingly, the court held that as a matter of law that the *per se* attack could not stand.

On appeal, this court affirmed and in a very brief (2 page) opinion expressed agreement with the district court's "holding that the antitrust laws are inapplicable to the New York Stock Exchange insofar as its prescribing of minimum commission rates is concerned." 371 F.2d at 411.

The court below read *Kaplan*, both the opinions of the district court and this court, as holding that because the subject of commission rates is subject to SEC review under

section 19(b) of the Securities Act, it is not subject to antitrust attack, *per se* or otherwise. Premised on this reading of *Kaplan* the district court concluded that the bar against commission sharing, being an "integral part of commission rate structure" was likewise immune from antitrust attack, *per se* or otherwise.

[1] In reviewing the lower court's determination in this cause, we first observe that the district court correctly stated in its opinion that in *Silver,* the Supreme Court held that anti-competitive conduct by the Exchange, not subject to review by the SEC, may be reviewed by an antitrust court. It further opined, however, that the Supreme Court "intimated" that a different result, i.e. antitrust immunity, would follow where the conduct complained of was subject to SEC review. We disagree, as we find in the teachings of *Silver,* no "intimation" that the mere possibility of SEC review wraps the conduct of the Exchange in an impregnable shield of antitrust immunity. In our opinion this interpretation completely disregards the firm directive in *Silver* that "Repeal is to be regarded as implied only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary." 373 U.S. at 357, 83 S.Ct. at 1257. In our view, *Silver* teaches that a reconciliation of the two statutory schemes is not foreclosed simply because the Securities Act and the review jurisdiction of the SEC may touch upon the activity challenged under the antitrust laws. As the Court in *Silver* pointed out, the New York Stock Exchange's constitution and rules are permeated with instances of regulation of member relationships with non-members, including non-member broker dealers, and that in meeting its public trust established by the Securities Exchange Act of 1934, the Exchange may properly adopt rules governing the relations of its members with non-

members. That general power to adopt rules relating to the relations of its members with non-members, however, does not in and of itself place the application of such rules outside the reach of the antitrust laws. Rather it is at this point that the analysis of reconciliation really begins.

[2] Before the investing public of the United States may be deprived of the benefit of competition through the vehicle of Exchange rules, it must be established that the Exchange's exemption from the antitrust laws is necessary to discharge its responsibilities under the Securities Exchange Act. See Baxter, NYSE Fixed Commission Rates: A Private Cartel Goes Public, 22 Stan.L.Rev. 675, 689 (1970); Nerenberg, Applicability of the Antitrust Laws to the Securities Field, 16 West.Res.L.Rev. 131 (1964); Johnson, Application Of Antitrust Laws To The Securities Industry, 20 S.W.L.J. 536 (1966); Comments of the United States Department of Justice, filed before the Securities Exchange Commission Inquiry into New York Stock Exchange Proposals to Permit Public Ownership of Member Corporations, SEC release No. 8717. In short, its exemption must be based on a showing of true necessity. As applicable here, it must be established that subjecting the antirebate rule to antitrust attack will frustrate the purpose of the Securities Exchange Act or make it substantially ineffective. "Otherwise, the benefits of competition, acknowledged by Congress, would be sacrificed needlessly." United States v. Third National Bank in Nashville, 390 U.S. 171, 189, 88 S.Ct. 882, 893, 19 L.Ed.2d 1015 (1968).

In the record before us there is no evidence, save for the allegations of plaintiff, as to the effects of the anticompetitive conduct complained of; there is no evidence as to the extent to which the challenged rule is subject to actual review by the SEC; there is no evidence as to what

in the regulatory scheme "performs the antitrust function"; and, most notably, there is no evidence as to why the antirebate rule must be preserved as "necessary to make the Securities Exchange Act work." In sum, this record falls woefully short of the meticulous analysis called for in *Silver*.

As to the district court's reliance on the opinion of this court in Kaplan v. Lehman Brothers, we find essential distinctions between that case and the case presently before us. The most obvious distinction is that in *Kaplan* the plaintiffs argued only that the minimum commission rate structure was illegal *per se*. This contention directly contradicts the rationale of *Silver*, which made, "plain that action taken by the Exchange and its members, pursuant to its statutory authority to make rules, is not illegal *per se* under the Sherman Act." *Kaplan*, 250 F.Supp. at 564.[3] In this case Thill does not contend that the anti-rebate rule of the Exchange is illegal *per se*, but asks for the application of a rule of reason. See Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619 (1911).

To further distinguish the cases, we recite the following comments of the trial court in *Kaplan*, relating to the anti-competitive conduct there complained of. In distinguishing *Silver* the court stated (at 565):

> "The power to deny information to non-members of an exchange is plainly susceptible to misuse as a means to destroy competition. The power to fix rates,

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[3] See also Baum v. Investors Diversified Services, Inc., 286 F.Supp. 914 (N.D. Ill. 1968), where a similar conclusion was reached in a *per se* attack under the Robinson Patman Act against the pricing practices under the Investment Company Act of 1940. Aff'd 409 F.2d 872 (7th Cir. 1969). The district court there likewise interpreted *Kaplan* as involving a *per se* attack only.

> unlike the power to exclude, is not a weapon that can be used to injure a particular competitor. The rates, once fixed, apply equally to all Exchange members and to all customers. It is not suggested by the plaintiffs here that the rates are not uniformly applied, that the schedules are discriminatory, or that the power has been used to eliminate competition beyond that elimination inherent in any system of authorized price-fixing."

The power to refuse to share commissions with certain non-members is "plainly susceptible to misuse as a means to destroy competition." It is a weapon "that can be used to injure a particular competitor." The rates once fixed, apparently do not "apply equally to all." (See pp. 815-816, infra). And, it is "suggested by plaintiffs here that the rates are not uniformly applied," are discriminatory, and that the "power has been used to eliminate competition."

While we are of the opinion that the distinctions between this case and *Kaplan* firmly support the result we reach here, we should note that the district court could have been misled by the abbreviated rationale of this court in *Kaplan,* particularly by the statement that, "the antitrust laws are inapplicable to the New York Stock Exchange insofar as its prescribing of minimum commission rates is concerned." 371 F.2d at 411. This statement apparently could imply a broader immunity than is warranted by the teachings of *Silver.* See Baxter, NYSE Fixed Commission Rates: A Private Cartel Goes Public, 22 Stan. L.Rev. 675, 690 (1970); Johnson, Application Of Antitrust Laws To The Securities Industry, 20 S.W.L.J. 536, 558-9 (1966); Note, Monopolies—Immunity From Antitrust Liability—Minimum Commission Rates Of Stock Exchanges, 19 Case Wes.Res.L.Rev. 167 (1967). It was such an interpretation that obviously impelled the sharp criticism of

this court's opinion by Chief Justice Warren when he dissented from the Supreme Court's denial of Certiorari in *Kaplan*. The Chief Justice discussed the importance of the issues presented in the case and complained that the substantial allegations of the plaintiffs were never afforded the hearing called for in *Silver*.

> "The court below, in a two-page opinion, held that a repeal of the antitrust laws was required to make the Securities Exchange Act work, and that 'the self-regulatory function of the exchange has been exercised by virtue of § 19(b),' 371 F.2d, at 411. In my view, this blunderbuss approach falls far short of the close analysis and delicate weighing process mandated by this Court's opinion in *Silver*.
>
> "The importance of the New York Stock Exchange in the functioning and livelihood of this Nation can not be gainsaid. Every-increasing millions of persons and billions of dollars are affected by the Exchange's practices. Without expressing any final view on the merits of the controversy, I am concerned that the law on this subject is to be permitted to lie where it has aimlessly fallen by virtue of the scanty opinion below. In my judgment, the claims advanced by petitioners raise important questions not only as to the compatibility of the Exchange's rate-fixing practice with this Nation's commitment, embodied in the antitrust laws, to competitive pricing, but also as to the fulfillment of the goal of investor protection embodied in the securities laws." 389 U.S. 954 at 957-958, 88 S. Ct. 320, 19 L.Ed.2d 365.

Even the "broad language" of *Kaplan*, however, does not go so far as the Exchange now would urge. It argues that potential review by the SEC vests that agency with exclusive jurisdiction over the subject to the exclusion of the antitrust court. The lower court, at least in part, adopted this theory finding that it would not "be in the

interest of making the 1934 Act work" to undertake "an inquiry into the reasonableness of the Exchange's prohibition or to apply the antitrust laws to the challenged practice." In so finding the court stressed that the, "SEC is currently exercising its supervisory duty over this area of Exchange self regulation, and I am of the opinion that such supervision constitutes more than adequate review and control of the Exchange practices." This conclusion, relating to the adequacy of the SEC's review, was apparently based on the fact that the SEC has from time to time reviewed and approved the rate structure of the Exchange and more particularly on May 28, 1968 the SEC announced the commencement of an investigation and public hearing to consider changes in the rules, policies and practices of all exchanges respecting commission rate structure. The announcement published by the SEC listed "Economic Access to the Exchange Market by Non-Member Broker Dealers" as one of the matters to be inquired into. These hearings are still in progress. From these limited facts the court concluded, "It thus appears clear that the SEC has and is currently exercising its § 19(b) duty of supervision over the Exchanges' commission structure".

[3] As we observed above, there is no evidence in the record that the SEC is exercising actual and adequate review jurisdiction under the Act. Furthermore, even the fact that the SEC may be exercising its proper supervisory power over the rules of the Exchange does not in and of itself cloak the Exchange with antitrust immunity for its conduct relating to those rules. Of course it is not disputed that in exercising its review power under section 19(b), the SEC, like other regulatory agencies, may weigh and consider antitrust factors. See The Rules of The New York Stock Exchange, 10 S.E.C. 270 (1941).

But, that fact does not vest the Commission with primary responsibility for the enforcement of competition as mandated by Congress in the antitrust laws. United States v. First National Bank and Trust Co. of Lexington, Ky., 376 U.S. 665, 84 S.Ct. 1033, 12 L.Ed.2d 1 (1964); United States v. Philadelphia National Bank, 374 U.S. 321, 83 S.Ct. 1715, 10 L.Ed.2d 915 (1963); California v. Federal Power Commission, 369 U.S. 482, 82 S.Ct. 901, 8 L.Ed.2d 54 (1962).[4] These cases, particularly the *Philadelphia National Bank* case, squarely reject the Exchange's contention that the court's inquiry must end once it is established that its rules were adopted pursuant to its duty of self regulation under the 1934 Act and are subject to SEC review.

In *Philadelphia National Bank,* a merger of two large banks in the Philadelphia area was approved by the Comptroller of the Currency pursuant to the Bank Merger Act of 1960. Under the Act the Comptroller is required to con-

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[4] These and numerous other cases referred to in the Court's opinion in United States v. Philadelphia National Bank, hold that repeal of antitrust laws in regulated industries is to be implied only where necessary to permit the agency to fulfill its statutory function. Repeal has been found in only a few cases where the regulatory body has been granted specific broad and detailed authority over rates, service offerings and market areas and where it has been granted express antitrust exemptions for agency approved transactions. Even under these circumstances the exemptions have been limited. See, for examples of the exemptions and their limits, Georgia v. Pennsylvania Railroad Co., 324 U.S. 439, 65 S.Ct. 716, 89 L.Ed. 1051 (1945), and 49 U.S.C. §§ 5 par. (11), 5(b) (railroads and trucking); Carnation Company v. Pacific Westbound Conference, 383 U.S. 213, modified 383 U.S. 932, 86 S.Ct. 781, 15 L.Ed.2d 709 (1966), and 46 U.S.C. §§ 813(a), 814 (shipping); Pan American World Airways, Inc. v. United States, 371 U.S. 296, 83 S.Ct. 476, 9 L.Ed.2d 325 (1963) and 49 U.S.C. § 1384 (airlines).

sider the effect on competition in passing on merger applications. And, before granting approval under the Bank Merger Act, the Comptroller received reports from the Attorney General and from other government agencies as to the effect of the merger on competition. Despite the Comptroller's statutory approval, the Justice Department attacked the merger as a violation of section 7 of the Clayton Act. 15 U.S.C. § 25. In resisting the attack, the banks argued that because the Bank Merger Act directed the Comptroller to consider competitive factors before approving mergers, any merger so approved was immunized from challenge under the antitrust laws. In rejecting this contention, the Supreme Court observed that, "No express immunity is conferred by the Act", and that, "Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored". 374 U.S. at 350, 83 S.Ct. at 1734, citing a legion of cases including Silver v. New York Stock Exchange.

In our view the facts here are much stronger in favor of application of the antitrust laws than were those in the *Philadelphia Bank* case. In reviewing the rules of the Exchange the SEC is not required to consider their effect upon competition. On the contrary, its history in reviewing rules adopted by the Exchange indicates a reluctance to do so. It has been suggested that the SEC has never, "forcibly altered an Exchange's commission rate structure, and there is little to indicate that it has even thoroughly investigated proposed rate revisions". Note: Monopolies—Immunity From Antitrust Liability—Minimum Commission Rates Of Stock Exchanges, 19 Case Wes.Res. L.Rev. 167, 173 (1967). In the *Kaplan* case discussed in detail above, it was alleged without contradiction that the underlying data used by the SEC in reviewing each of the five rate increases since 1934 have been essentially

those supplied by the Exchange, and have been very limited in scope and content. See dissenting opinion of Chief Justice Warren, 389 U.S. at 956, 88 S.Ct. at 321.

Legal writers have also been critical of the SEC's passive supervision of the Exchange. One has described the SEC as a "tame watchdog", as a result of which "self-regulation has come to mean, at least to the industry and particularly to the New York Stock Exchange, that the SEC will observe a rather passive role, leaving the industry to govern itself in its own wisdom." Jennings, Self-Regulation in the Securities Industry; The Role of the Securities and Exchange Commission, 29 Law and Contemp.Prob. 663, 664-5 (1964). See also, Note: Antitrust And The Stock Exchange, Minimum Commission or Free Competition, 18 Stan.L.Rev. 213 (1965).

Parenthetically, and by way of expressing our agreement with the Supreme Court's policy of strictly limiting all antitrust exemptions in deference to regulatory bodies, we also note that the history of United States regulatory agencies in general seems usually to record an ever growing absence of the spirit required for vigorous enforcement of the antitrust laws. Rather, it seems to demonstrate that shortly following the establishment of administrative procedures the regulatory agency usually becomes dominated by the industry which it was created to regulate.

[4, 5] Perhaps Congress had this possibility in mind when it strictly limited the powers of the regulatory agencies to enforce the antitrust laws. Insofar as the securities industry is concerned, it is clear that Congress did not intend to exempt that industry from antitrust liability when it passed the Securities Exchange Act. United States v. Morgan, 118 F.Supp. 621 (S.D.N.Y. 1953). Their purpose in passing the Act and the primary responsibility of the

SEC thereunder is to protect investors. It is in this area of public protection that the SEC claim their expertise. On the other hand, it should be remembered that the courts of the United States have over the years become the repository of antitrust expertise. Congress and our Supreme Court have directed the courts to employ this expertise unless the court in a given case concludes that its employment will frustrate the goals of the regulatory scheme. As we have indicated herein, no such conclusion is justified in this case, at least not at this stage of the proceedings—before any evidence has been offered to support the proposition that judicial interference with the Exchange's anti-rebate rules will frustrate the goals proposed by the Securities Exchange Act.

In remanding this cause to the district court where this inquiry may be pursued, we think it appropriate to note certain observations that have occurred to us in reviewing the record and in considering the arguments of both parties in this complex case.

Most important, before a court may abdicate its jurisdiction on the antitrust issue the defendant must establish its anticompetitive conduct as justified because it is necessary for the operation of the Securities Act.

We further note from our review of the transcript of proceedings below in certain portions not included in the Appendix (pages 3-5, 22-23, 30-33, of proceedings of November 15, 1968) that the district court inquired at the commencement of defendant's argument in support of its motion for summary judgment, as to whether factual evidence would be necessary to decide this case and if so, what type of evidence.

Counsel for plaintiff suggested to the court that expert testimony would be required to establish, if possible, that

the conduct complained of was necessary to make the Securities Act work. We agree and offer the further suggestion that it seems particularly appropriate in a case of this nature for the court to invite the participation, by way of expert testimony and legal argument, of the government agencies so vitally interested in the issues before the court—the SEC and the Department of Justice.

We make the further observation, without prejudging the issue, that it is difficult to conceive how the Exchange can on remand argue that the antirebate rule is "necessary to make the Act work" when its members have gone to imaginative extremes to circumvent the rule when it serves their private economic purposes to do so. It appears from all we can read on the subject that the rule is honored much more in its breach than in its observance, as through various devices, member firms routinely share commissions or the equivalent with favored non-member brokers. One writer, after first discussing the business considerations that require member and non-member co-operation, explains the system as follows:

> "To accommodating these obvious member and non-member interests, the principal hurdle is the Exchange ban on 'any rebate, return, discount or allowance' off the NYSE rate schedule.
>
> "It is to get around this antirebate hurdle that a variety of reciprocal business and special service arrangements have emerged. Highlighting typical reciprocity deals, a member may place 'business on a regional exchange with a nonmember who is a member of that exchange even though * * * the member is also a member of the regional exchange * * * and could have placed the business there directly or * * * the security is traded on the NYSE as well as the regional exchange' so that the member could have just as well done the business at home. And where an

> over-the-counter dealer is to be the recipient of member favor, the member may deal through the nonmember even though the member's trading department could itself have effected the transaction. As the ratios for such *quid pro quo's* become formalized, oft' times in the area of $1 in commission to the nonmember for every $2 or $3 he produces for a member, these devices become little more than arrangements for commission splits—condoned so long as they are based simply on the member's hope that he can secure return business'. Much this same goal of recompense for past or lure for future nonmember favor can also be served by the member's performance on advantageous terms, of a gamut of 'special services: installation and maintenance of wire services, clearance of non-Exchange transactions, office space, special research, and promotional materials and displays.' Here, again, under Exchange construction of its rules, some 'nominal charge' for such 'services' can convert a 'prohibited rebate into a permissible arrangement.' '' Bicks, Antitrust and the New York Stock Exchange, 21 Bus. Lawy. 129, 146-147 (1965).

See also, Jennings, Self-Regulation in the Securities Industry: The Role of the Securities and Exchange Commission, 29 Law and Contemp. Prob. 663, 688-9 (1964); Nerenberg, Applicability of the Antitrust Laws to the Securities Field, 16 West.Res.L.Rev. 131, 148 (1964); Comment, The Minimum Commission System And The New York Stock Exchange, 38 Ford.L.Rev. 84, 85-6 (1969) Note, The Application of Antitrust Laws To The Securities Industry, 10 Wm. & Mary L.Rev. 136, 160-2 (1968).

Concern over these practices has also been expressed by the President of the Exchange (Letter of President Robert W. Haack to Members of the Exchange, January 2, 1968), and by the SEC (Director Irving M. Pollack to all national exchanges, July 18, 1966, and Report of the Special Study of the Securities Markets, 1963).

It is also important to note that other national stock exchanges manage to make the Act work without need of the antirebate rule.

Finally, and apart from the antirebate rule, the complaint below raised additional issues which were not considered by the district court when it granted defendant's motion for summary judgment. Specifically, Thill alleges that the Exchange has engaged in unfair advertising practices aimed at undermining public confidence in the competence and reliability of non-member broker-dealers. It also alleges that members, through the benefit of the antirebate rule, pirate customers of non-members by assuring them that they can operate less costly than non-members because the non-member must tack on some commission for his services. Such allegations of predatory practices in such a vital industry clearly require more than summary dismissal and should be fully considered on remand.

Accordingly, the cause is reversed and remanded to the district court for full proceedings consistent with the conclusions herein.

SWYGERT, Chief Judge (concurring).

In the main I concur in Judge CAMPBELL'S excellent treatment of the difficult problems of conflict between antitrust and securities laws presented in this case.

In my view the appeal presents only one question: whether Congress, by the enactment of the Securities Exchange Act of 1934, intended to exempt rules promulgated by The New York Stock Exchange from the general competitive principles contained in the antitrust laws and to place exclusive jurisdiction over those rules in the Securities Exchange Commission. For the reasons set out below, I agree with Judge Campbell that Silver v. New York Stock

Exchange, 373 U.S. 341, 83 S.Ct. 1246, 10 L.Ed.2d 389 (1963), although not directly in point, provides sufficient guidance to hold that the district court erred in ruling that Article XV, § 1 of The New York Stock Exchange Constitution (the antirebate rule) is exempt from attack under the antitrust laws.

Two additional questions exist in this case which are not before us in this appeal: (1) whether the doctrine of primary jurisdiction requires that the anti-competitive aspects of an exchange rule be considered in the first instance by the SEC; and (2) whether the antirebate rule violates § 1 and § 2 of the Sherman Act, 15 U.S.C. §§ 1 & 2. Both questions are exceedingly difficult and require careful consideration by the district court. Although we may indicate relevant lines of inquiry on remand, I believe our function as an appellate court is best fulfilled by eschewing consideration of the merits of these questions.

I

Defendant argues that the antirebate rule is exempt from antitrust attack if it is within the scope of the exchange's duty of self-regulation and subject to the SEC's power of review and revision under section 19(b) of the 1934 Act.

This position is not compelled by Silver v. New York Stock Exchange, 373 U.S. 341, 83 S.Ct. 1246, 10 L.Ed.2d 389 (1963). In that case plaintiff, a nonmember broker, alleged that defendant unlawfully deprived him of private telephone wire connections to municipal bond and corporate securities departments of member firms by means of an *ex parte* order issued by The New York Stock Exchange to certain of its members. Although the Exchange's power to terminate wire connections with nonmember brokers was implicit in its constitution and rules, Silver v. New York Stock Exchange, *supra* at 354-55, nn. 9 & 11, 83 S.Ct. 1246,

10 L.Ed.2d 389, the Supreme Court chose to treat plaintiff's complaint as challenging a particular instance of exchange action. When so viewed the Court ruled that defendant had violated the Sherman Act. Its holding may be summarized as follows. (1) The action of the Exchange would be a per se violation of the Sherman Act unless immunized by the Securities Exchange Act of 1934, Associated Press v. United States, 326 U.S. 1, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945); Fashions Originator's Guild v. FTC, 312 U.S. 457, 61 S.Ct. 703, 85 L.Ed. 949 (1941). (2) The rules applied by the Exchange were "germane to performance of the duty implied by § 6(b) and § 6(d) [of the 1934 Act] to have rules governing members' transactions and relationships with nonmembers." Silver v. New York Stock Exchange, *supra* at 356, 83 S.Ct. at 1256. As a result the action of the defendant was not a per se violation. (3) Nevertheless, repeal of the antitrust laws by the enactment of the 1934 Act "is to be regarded as implied only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary." *Id.* at 357, 83 S.Ct. at 1257. (4) The aims of the 1934 Act offer no justification for "self-regulation conducted without provision for some method of telling a protesting nonmember why a rule is being invoked * * * and allowing him to reply in explanation of his position." *Id.* at 361, 83 S.Ct. at 1259. For this reason the Court held that the conduct of the defendant violated the Sherman Act.

Defendant argues, however, that our decision in Kaplan v. Lehman Bros., 250 F.Supp. 562 (N.D.Ill. 1966), aff'd, 371 F.2d 409 (7th Cir.), cert. denied, 389 U.S. 954, 88 S.Ct. 320, 19 L.Ed.2d 365 (1967), by resolving a question expressly reserved in *Silver,* adopts the rules which it advances. Thus defendant emphasizes that the Court in *Silver* noted that, "[s]hould review of exchange self-regu-

lation be provided through a vehicle other than the antitrust laws, a different case as to antitrust exemption would be presented." Silver v. New York Stock Exchange, *supra* at 360, 83 S.Ct. at 1259. It argues that the *Kaplan* case held the exchange rule governing minimum commission rates exempt from the Sherman Act on the ground that section 19(b) of the 1934 Act provides agency review of exchange self-regulation through authority of the SEC "to alter or supplement the rules of * * * [an exchange] in respect to such matters as * * * (9) the fixing of reasonable rates of commission, interest, listing and other charges."

I agree with Judge CAMPBELL that defendant reads the *Kaplan* case too broadly and that it stands only for the limited proposition that the Exchange's minimum commission rate rule was not a per se violation of the Sherman Act. I further concur with his view that the Supreme Court would apply the holding of *Silver* to exchange rules as well as to a specific application of those rules and that SEC supervision under section 19(b) is insufficient to place exclusive jurisdiction over exchange rules in the SEC. In reaching this conclusion I would reject defendant's argument that the absence of discussion of the anticompetitive aspects of exchange rules in the legislative history of the 1934 Act constitutes implied repeal of the antitrust laws for rules within the domain of exchange self-regulation. This argument seems especially weak in light of the Maloney Act, 15 U.S.C. §§ 78 a-hh, enacted in 1938, which expressly provides for consideration by the SEC of anticompetitive practices in analogous regulation of registered securities associations. Thus the availability of SEC review of exchange self-regulation under section 19(b) is, in my view, irrelevant to the scope of exchange exemption from the antitrust laws. However, for reasons discussed

below, I believe the existence of this review *is* relevant to a determination of whether the SEC possesses primary jurisdiction over exchange rules.

For these reasons I agree that this case must be remanded for fresh consideration of whether the antirebate rule violates the Sherman Act. It is clear that this rule would constitute a per se violation of that law unless immunized by the 1934 Act. Further, the district court correctly held that the antirebate rule is within the Exchange's duty of self-regulation. Thus, the court on remand will be faced with only one question: whether the antirebate rule is necessary to make the 1934 Act work. As to the resolution of this issue I, of course, express no views.

II

I differ with Judge CAMPBELL'S excellent opinion only insofar as it can be interpreted as deciding that the SEC does not possess primary jurisdiction to consider the anticompetitive aspects of exchange rules. I believe this question lurks in the background of this case and lies at the heart of proper resolution of conflicting antitrust and securities law considerations present in this appeal. See generally Baxter, NYSE Fixed Commission Rates: A Private Cartel Goes Public, 22 Stan.L.Rev. 675, 683-689 (1970). The history of the proceedings below indicates that the issue of primary jurisdiction was never considered. Thus, defendant moved for summary judgment on the sole ground that exchange rules were within the exclusive jurisdiction of the SEC and exempt from antitrust attack. I believe the district court decided defendant's motion on this basis even though the court did refer to presently pending proceedings before the SEC to support its holding on exclusive jurisdiction. For the reasons that

follow I am convinced that the issue of primary jurisdiction is not resolved by prior cases. Therefore, on remand the district court may consider this issue prior to a decision on the merits of plaintiff's complaint.

The issue of primary jurisdiction was not reached in Silver v. New York Stock Exchange, *supra,* since the Court interpreted plaintiff's complaint as challenging a particular application of an exchange rule, a matter over which the SEC was without jurisdiction. There the Court stated: "[The 1934 Act] does not give the Commission jurisdiction to review particular instances of enforcement of exchange rules. * * * This aspect of the statute * * * obviates any need to consider whether petitioners were required to resort to the Commission for relief before coming into court. * * *" *Id.* 373 U.S. at 357-358, 83 S.Ct. at 1257. In footnote 12 the Court indicated that a different result might obtain if exchange self-regulation were subject to SEC jurisdiction and ultimate judicial review. As a result the existence of primary jurisdiction by the SEC to consider the anticompetitive aspects of exchange rules is a question of first impression in this case.

Cases concerning primary jurisdiction of other administrative agencies to consider antitrust matters do not provide clear guidance for resolution of this question. Compare, Pan American World Airlines, Inc. v. United States, 371 U.S. 296, 83 S.Ct. 476, 9 L.Ed.2d 325 (1963); California v. FPC, 369 U.S. 482, 82 S.Ct. 901, 8 L.Ed.2d 54 (1962). Such cases demonstrate that the existence of primary jurisdiction depends upon consideration of numerous factors concerning agency jurisdiction and expertise. Therefore, in resolving this issue the following questions, among others, might be considered on remand: (1) whether and to what extent the SEC is empowered to consider anti-

trust laws and policy in fulfilling its duty of review of exchange self-regulation; (2) whether an aggrieved party may initiate SEC review of exchange rules under the provisions of the Securities Exchange Act or the Administrative Procedure Act; (3) whether and to what extent SEC expertise would be useful in resolving, in the first instance, the question of whether a given rule is necessary to make the Securities Act work; and (4) whether the anticompetitive aims of the Sherman Act can be achieved without subjecting the exchanges to treble damage suits which necessarily result if the doctrine of primary jurisdiction is unavailable to the defendant in this case. These issues have not been briefed in this appeal and I decline to attempt their resolution a this time.

PELL, Circuit Judge (concurring in part and dissenting in part).

While I concur in the majority's determination to remand this cause for further proceedings, I find it necessary with respect to the scholarly and analytical opinion of Judge CAMPBELL to dissent with regard to the scope of the further proceedings ordered.

In my opinion, the "fixing of reasonable rates of commission * * * and other charges" as provided for by § 19 (b) (9) of the Securities Exchange Act of 1934 (15 U.S.C. §78s(b) (9)) necessarily includes as an ancillary power the prohibition of rebates. The practice of rebates in the field of securities undoubtedly might well involve antitrust considerations if the jurisdiction in the area had not been placed by Congress in the Securities and Exchange Commission. But, in my opinion, it has been so placed.

A scheme or pattern of fixing commisisons would seem to me to involve as an integral part thereof control of

the matter of possible rebates. As of the present time, that control has been exercised by a prohibition of any rebates.

I would therefore eliminate from further proceedings in this case the matter of the Exchange rule *per se,* being in my opinion controlled by Kaplan v. Lehman Brothers, 250 F.Supp. 562 (N.D.Ill. 1966), 371 F.2d 409 (7th Cir. 1967), cert. denied, 389 U.S. 954, 88 S.Ct. 320, 19 L.Ed.2d 365 (1967).

My opinion in this respect is buttressed by the fact that the very matter in issue is now under consideration by the SEC which on May 28, 1968 announced investigation and public hearings on rate structure matters including economic access to the Exchange market by non-member broker-dealers.

It would seem inappropriate, in my opinion, for this court, or the court below, to attempt to determine the reasonableness of the Exchange prohibition against commission sharing, which the SEC has the power to modify if not consistent with the purposes of the 1934 Act.

The matter of the place of antitrust regulation where a regulatory agency is involved has frequently been before the courts. See the comments of Judge Leventhal in concurring, Cities of Slatesville v. AEC (D.C.Cir. 1969).

To paraphrase the language of Judge Leventhal, it is a fair synthesis of these cases that a statute providing for licensing or other regulation is presumed to permit consideration of antitrust principles, with the harmonizing of diverse and even competing principles, unless a contrary intent appears expressly or by necessary implication. No intent to disregard the antitrust principles appears in the Securities Exchange Act of 1934.

However, the plaintiff here as contrasted to *Kaplan* does not rely solely on the claimed illegality of the anti-rebate rule but further alleges in effect that if the rule were valid the practices engaged in are violative of anti-trust principles. Particular reference was made to various sophisticated devices whereby favored non-members had the practical effect of rebates. This matter as well as those referred to in the next to last paragraph of the majority opinion created genuine issues of fact which should have precluded a summary judgment.

I also must respectfully question the majority's observation regarding lack of diligence on the part of regulatory agencies enforcing antitrust laws and succumbing to the domination of the industry which they were created to regulate. If it be a fact that there is an apparent lack of diligence this may consciously have been a result reached in balancing diverse public interests. However that may be, I do not have any basis in fact on which to concur in the observation.

It is also to be noted that the parties agree that the SEC may not award damages. It has been held in an analogous situation that under these circumstances even though injunctive relief might be denied, damages could be pursued in the court proceedings. S. S. W. Inc. v. Air Transport Ass'n of America, 89 U.S. App. D.C. 273, 191 F.2d 658, 663 (1951).

For the reasons hereinbefore set out I would reverse and remand but would limit the issues as hereinbefore indicated although in so doing I do not purport, as I am sure the majority did not purport, to suggest what the district judge's determination could be after hearing the evidence which will be adduced.

Opinion by Judge Pell

Judge Cudahy concurring

JUDGMENT — ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

October 20, 1980

Before
Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. PHILIP NICHOLS, Associate Judge*
Hon. RICHARD D. CUDAHY, Circuit Judge

No. 79-2253

THILL SECURITIES CORPORATION, et al.,
Plaintiff-Appellant,
v.
THE NEW YORK STOCK EXCHANGE,
Defendant-Appellee,
and
THE UNITED STATES SECURITIES AND EXCHANGE COMMISSION,
Intervening Defendant-Appellee.

Appeal from the United States District Court for the Eastern Division of Wisconsin.

No. 63-C-264

JOHN W. REYNOLDS, Chief Judge

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* Honorable Philip Nichols, Associate Judge, United States Court of Claims, sitting by designation.

This cause was heard on the record from the United States District Court for the Eastern District of Wisconsin, ... Division, and was argued by counsel

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

EXTRACT FROM DEFENDANT'S EXHIBIT 662 — TEXT OF APRIL 24, 1972 AMENDMENT TO SECTION 2, ARTICLE XV OF THE CONSTITUTION OF THE NEW YORK STOCK EXCHANGE EFFECTING "40%" DISCOUNT FOR CERTAIN NONMEMBER BROKER-DEALERS.

(h) A member, member firm or member corporation may, on orders which he or it receives from a nonmember broker-dealer whose principal place of business is in one of the United States, the District of Columbia or the Commonwealth of Puerto Rico, and which is a member of the National Association of Securities, Inc. or is subject to Sec. 15(b)(8) of the Securities Exchange Act of 1934, for the account of any customer whose account is carried by such broker-dealer, or is introduced by such broker-dealer to such member, member firm or member corporation, allow not in excess of a 40% discount from the commission computed in accordance with the provisions of paragraph 2(a), provided that the primary purpose of such nonmember broker-dealer and of any parent of such nonmember broker-dealer is the transaction of business as a broker or dealer in securities in one of the United States, the District of Columbia or the Commonwealth of Puerto Rico within the meaning of Section 7(b) of Article IX, and the rules thereunder and, provided, further, that such nonmember broker-dealer is subject to an agreement in writing as provided by rule adopted by the Board of Directors, which agreement has not been terminated, containing such provisions as may be required from time to time by rule adopted by the Board of Directors and providing that any such discount so allowed shall be retained by such nonmember broker-dealer free from any rebate, return, discount or allowance made in any shape or manner, or by any method or arrangement direct or indirect, to or for the benefit of any cus-

tomer of such nonmember broker-dealer, except that with respect to any order for the account of a customer whose account is introduced to such nonmember broker-dealer by a second nonmember broker-dealer, the nonmember broker-dealer may allow all or any portion of such discount to such second nonmember broker-dealer provided that the second nonmember broker-dealer would qualify for a discount under the provisions hereof had it introduced its customer's account directly to the member, member firm or member corporation and is itself subject to a similar agreement.

The provisions of this paragraph 2(h) shall expire one year after the effective date hereof, unless extended for such period of time, or from time to time, by the Board of Directors. [DX 662, ¶1702, at 1108]

EXTRACT FROM DEFENDANT'S EXHIBIT 663— TEXT OF NYSE RULE 385 ADOPTED EFFECTIVE APRIL 24, 1972 TO IMPLEMENT PROVISIONS OF ABOVE AMENDMENT TO NYSE CONSTITUTION, SETTING FORTH TERMS AND CONDITIONS FOR APPLICATION OF 40% COMMISSION DISCOUNT MADE AVAILABLE TO CERTAIN NONMEMBER BROKER-DEALERS.

Rules 385. (a) No discount shall be allowed by any member organization to any nonmember broker-dealer as permitted by Article XV, Section 2, paragraph (h) of the Constitution, unless at the time the nonmember broker-dealer is subject to an agreement in writing with the Exchange providing:

(1) Any discount allowed to such nonmember broker-dealer as permitted by the said paragraph (h) shall be retained by such nonmember broker-dealer free from any rebate return discount or allowance made in any shape or manner, or by any method or arrangement, direct or indirect, to or for the benefit of any customer of such nonmember broker-dealer, except that with respect to any order for the account of a customer whose account is introduced to such nonmember broker-dealer by a second nonmember broker-dealer (hereinafter called "introducing nonmember"), the nonmember broker-dealer may allow all or any portion of such discount to the introducing nonmember provided that the introducing nonmember would qualify for a discount under the provisions of said paragraph (h) had it introduced its customer's account directly to a member or member organization of the Exchange, and provided further that the introducing nonmember broker-dealer is itself subject to an agreement in writing with the Exchange as provided under Section (b) of this Rule. For the purpose of this Rule, the term "customer" shall be defined as that term is defined in Section 6(c)(2)(A)(ii) of the Securities Investors Protection Act of 1970.

(2) Such nonmember broker-dealer shall not receive any such discount except with respect to orders executed for the accounts of bona fide customers of such nonmember, whose accounts are carried by such nonmember broker-dealer or are introduced by such nonmember broker-dealer to the member or member organization which carries the account.

(3) Such nonmember broker-dealer shall cease to be qualified to receive any such discount whenever such nonmember breaches any provision of its agreement with the Exchange or whenever such nonmember ceases to maintain its principal place of business in one of the United States, the District of Columbia or the Commonwealth of Puerto Rico, or ceases to be a member of the National Association of Securities Dealers, Inc. or to be subject to Section 15(b)(8) of the Securities Exchange Act of 1934 or whenever the primary purpose of such nonmember and of any parent of such nonmember (as defined in Rule 318) ceases to be the transaction of business as a broker or dealer in securities within the meaning of such Rule. Whenever such nonmember ceases to be qualified to receive any such discount such nonmember shall be required to give the Exchange prompt written notice thereof.

(4) At any time and from time to time during normal business hours the Exchange shall have access to the books and records of such nonmember broker-dealer at its principal place of business in order to determine compliance by such nonmember with its agreement with the Exchange. Whenever any such examination by the Exchange fails to establish to the satisfaction of the Exchange compliance by such nonmember with the provisions of its agreement with the Exchange, or whenever such nonmember ceases to qualify for the discount provided by Article XV, Section 2, paragraph (h) of the Constitution, the Exchange may send written notice to such nonmember terminating such agreement and shall thereupon notify member organizations of such termination.

(5) Unless sooner terminated by such nonmember or the Exchange, such agreement shall terminate whenever the provisions of Article XV, Section 2, paragraph (h) of the Constitution shall expire.

(b) No introducing nonmember may receive all or any portion of any discount permitted by Article XV, Section 2, paragraph (h) of the Constitution, unless, at the time such discount is received, the introducing nonmember is subject to an agreement in writing with the Exchange providing:

(1) Any such discount so received shall be retained by the introducing nonmember free from any rebate, return, discount or allowance made in any shape or manner, or by any method or arrangement, direct or indirect, to or for the benefit of any customer of the introducing nonmember.

(2) The introducing nonmember shall not receive any such discount except with respect to orders executed for the accounts of bona fide customers of the introducing nonmember which accounts are carried by a nonmember broker-dealer subject to an agreement with the Exchange as provided under Section (a) of the Rule.

(3) The introducing nonmember shall cease to be qualified to receive any such discount whenever such nonmember breaches any provision of its agreement with the Exchange or whennever such nonmember ceases to maintain its principal place of business in one of the United States, the District of Columbia or the Commonwealth of Puerto Rico, or ceases to be a member of the National Association of Securities Dealers, Inc. or to be subject to Section 15 (b)(8) of the Securities Exchange Act of 1934 or whenever the primary purpose of such nonmember and of any parent of such nonmember (as defined in Rule 318) ceases to be the transaction of business as a broker or dealer in securities within the meaning of such Rule. Whenever such nonmember ceases to be qualified to

receive any such discount such nonmember shall be required to give the Exchange prompt written notice thereof.

(4) At any time and from time to time during normal business hours the Exchange shall have access to the books and records of such introducing nonmember at its principal place of business in order to determine compliance by such introducing nonmember with its agreement with the Exchange. Whenever any such examination by the Exchange fails to establish to the satisfaction of the Exchange compliance by such introducing nonmember with the provisions of its agreement with the Exchange, or whenever such introducing nonmember ceases to qualify for the discount provided by Article XV, Section 2, paragraph (h) of the Constitution, the Exchange may send written notice to such introducing nonmember terminating such agreement and shall thereupon notify members and member organizations and nonmember broker-dealers subject to agreements under Section (a) of this Rule of such termination.

(5) Unless sooner terminated by the introducing nonmember or the Exchange, such agreement shall terminate whenever the provisions of Article XV, Section 2, paragraph (h) of the Constitution shall expire.

[DX 663, ¶2385, at 3642-43]